

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

| | | |
|---------------------------|---|------------------------|
| In re: |) | |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 2:17-CR-208CW |
| |) | |
| TERRY CHARLES DIEHL, |) | |
| |) | |
| _____Defendant._____ |) | |

Transcript of Hearing on Motions in Limine

BEFORE THE HONORABLE CLARK WADDOUPS

October 26, 2017

Karen Murakami, CSR, RPR
8.430 U.S. Courthouse
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1 **Salt Lake City, Utah, Thursday, are October 26, 2017**

2 * * *

3 THE COURT: Good morning. We are here in
4 the matter of the United States v. Terry Charles Diehl,
5 case 2:17-cr-208. Will counsel please state their
6 appearance.

7 MR. HIRATA: Mark Hirata and Cy Castle, Your
8 Honor, on behalf of the United States.

9 THE COURT: Thank you.

10 MR. WASHBURN: Loren Washburn and Stephen
11 Peters for Terry Diehl, who is in the courtroom as well.

12 THE COURT: Thank you.

13 We're here on several -- maybe collectively
14 just really one motion, but we have several different
15 motions. They are your motions, Mr. Washburn. I'll let
16 you pick the order you want to argue them in and you may
17 proceed.

18 MR. WASHBURN: First of all, Your Honor, I
19 note having had the Third Superseding Indictment
20 returned and had the initial appearance on it today, the
21 motion to strike surplusage we'll formally withdraw
22 that, we mentioned that on Tuesday, but that's not now
23 an issue.

24 THE COURT: We'll indicate on the docket
25 that that's been withdrawn.

1 MR. WASHBURN: I think then, Your Honor, we
2 have just two motions, and I plan -- I think there --
3 you're probably right in saying there's some overlap in
4 them, but I plan to take up what we've styled as the
5 motion to exclude bad acts not charged in the Second
6 Superseding Indictment, which I guess now would be the
7 Third Superseding Indictment. But the motion wouldn't
8 change because of the changes in the Indictment. And
9 then Mr. Peters is planning to take up specifically the
10 issues raised in our motion to enforce the prior order
11 in limine.

12 Your Honor, in our motion, our motion was
13 prompted -- and I apologize for the short timeline. As
14 it turns out, we had our hearing on the 12th, I left for
15 Ireland on the 13th and got back the 21st. So when I
16 got back we had a brand new Indictment, and so I rushed
17 to get this motion put together and between Saturday
18 night at 10:00 when my flight landed and Monday, as soon
19 as I could. The point of the motion in limine is when
20 we talked about this last about our motion to exclude
21 other acts, and specifically with the other acts here
22 now we're talking about two categories, that's the
23 American Express expenditures and personal expenditures
24 out of the SVA accounts. When we talked about it last
25 we had a very different Indictment. I know the

1 government in their response yesterday said it's not a
2 very different Indictment, but I think that's because
3 they're actually not looking at what's charged in the
4 Indictment. They talk about having the same theory, but
5 having the same theory isn't the same as having the same
6 charges. And it's the charges and the elements that
7 something has to be relevant to in order to have an
8 other act admitted.

9 I want to note a couple of things before I
10 really get into it in earnest. The first thing, Your
11 Honor, is that throughout their argument, and I
12 mentioned this on the 12th when we had argument, the
13 government doesn't seem to take account of the fact that
14 this was a Chapter 11 bankruptcy. And that matters and
15 it matters in a very important way, and that's this:
16 Skyline Ventures Associates was never hidden.
17 Starting -- and I apologize, I've got a fair number of
18 exhibits here that I'll pass up as we go along. These
19 are Government's Exhibit 2-12 and 2-14. These are just
20 examples of monthly operating reports, Your Honor. 2-12
21 was the one filed for April of 2012, so this was filed
22 just a couple of weeks after the Statement of Financial
23 Affairs. And what you'll see there is a source of
24 income. When you look at the income, I think it's on
25 the third page, it lists Skyline Ventures Associates,

1 consulting fees of \$10,000, and then has a refund of
2 overdraft fee from Chase of \$34. And what you will see
3 if you look through all of the monthly operating
4 reports, which are in the Government's Exhibit series,
5 is that over the period of the bankruptcy SVA is listed
6 as a source of 96 percent of Mr. Diehl's reported
7 income.

8 Now, in a Chapter 11 what you have is a
9 debtor who comes and says, look, I can't pay all my
10 debts. I want to reorganize, I want to have a plan to
11 pay you back. And in forming a plan to pay them back
12 they have to articulate where their money is going to
13 come from to make that plan. Mr. Diehl reported SVA
14 from the very beginning as a source of his income.
15 We'll look a little bit later at his 2004 exam where he
16 says it's his only employer and that the deals that he's
17 planning to put together as part of his plan of
18 reorganization will be held in Skyline. So there was
19 never -- the fact of this as a Chapter 11 matter,
20 because not only did he not exclude it, it would have
21 been counterproductive for him to hide it.

22 The other thing I want to bring to the
23 court's attention is the government in their opposition
24 I think mis-describes their Indictment. The now Third
25 Superseding Indictment contains one count that we're

1 worried about here. These other acts, as far as I
2 understand it, don't go at all to Count 2 in the Third
3 Superseding Indictment, they only go to Count 1. And
4 specifically Count 1 has two prongs to it. It's a false
5 statement in bankruptcy. This is -- you know, when I
6 was at the Tax Division, we called false return counts,
7 like Count 2, tax perjury. And that's essentially what
8 this is, this is bankruptcy perjury, if you will. It's
9 coming in and making a specific false statement. And
10 this count alleges two of those. One of them relates to
11 a million dollars. And I think Mr. Hirata said on
12 Tuesday that this motion doesn't go to that million
13 dollars, and I would tend to agree with him. If I'm
14 mischaracterizing him, I apologize.

15 But really I think what the government is
16 intending to do from what I gather from their opposition
17 is to introduce these other acts that are contested
18 right now to go to what I'll call the second prong in
19 Count 1, and that is the Indictment alleges that
20 Mr. Diehl omitted SVA. There's a specific question on
21 the Statement of Financial Affairs, and the Indictment
22 alleges that SVA ought to have been reported and was
23 not. That's it. The government talks about subterfuge
24 and setting up SVA as a subterfuge to funnel money and
25 pay personal expenses and that that's their theory.

1 That's not the crime he's charged with. He's charged
2 with coming in and making two specific false statements.
3 And the one that's at issue here is that one specific
4 statement with regard to Count 18.

5 Why does that matter, Your Honor? It
6 matters for a couple of reasons. One of them being
7 we're going to look at the elements because in order for
8 404(b) evidence to be relevant it has to be relevant to
9 one of those elements. But first I think it's important
10 to understand what the stakes are here. And for that
11 I'll show you Exhibit 2. I've got a tab on the
12 important part here both for you and for the government.
13 I'll pass one up to your clerk as well. I apologize
14 that I didn't do that on the last one. So I just passed
15 up two documents. The larger one, Exhibit 2, is a
16 document called the Operating Guidelines and Reporting
17 Requirements of the United States Trustee. And this was
18 provided to Mr. Diehl, I believe that's what the
19 testimony will show. And if you go to page 12 where
20 it's tabbed it talks about reports on entities in which
21 debtor holds an interest. Okay. And what that says is
22 that pursuant to Federal Rule of Bankruptcy 2015.3, and
23 that's the smaller document I've handed up is that rule,
24 the debtor must file periodic reports of the value,
25 operations, and profitability of each entity in which

1 they hold a substantial or controlling interest. And it
2 says the first one needs to be filed within seven days
3 of the 341 and then they need to be filed every six
4 months thereafter.

5 Here's what's important there, Your Honor.
6 If Mr. Diehl had listed SVA on the SOFA as something
7 that he owned -- and let's assume for present purposes,
8 for purposes of this argument, we'll assume that the
9 government will be able to show that it should have been
10 listed. I'm not conceding that for purposes of the
11 trial, I'm just saying for today's argument. What
12 difference would it have made? Well, he wouldn't have
13 been required, and this is the specific point, he would
14 not have been required under the law that I've just
15 passed up here to report transaction-level detail. All
16 that would have been required is every six months there
17 be a report that listed the profitability -- the value,
18 operation, and profitability of the entity. That's it.
19 That's the difference, Your Honor.

20 Now, given, as I've shown, that SVA was
21 in -- not just disclosed in the bankruptcy, disclosed in
22 a way that any creditor in the Chapter 11 was going to
23 see it as here's the source of income. And given that
24 the only difference would have been periodic reports,
25 the question becomes, well, what -- you know, we're

1 attempting to show that these -- what was his intent to
2 defraud in failing to list SVA? And I think it's
3 important to understand the consequences of listing SVA
4 in order to evaluate whether something's relevant to his
5 intent to not list it, and specifically where listing it
6 would not have required him to disclose
7 transaction-level details, such as these expenditures.
8 There's not a strong incentive not to list it on there
9 and trigger that reporting requirement because the
10 reporting requirement that would have been triggered
11 would not have required transaction-level reporting. I
12 apologize, Your Honor, I'm going to grab a bottle of
13 water here.

14 I want to now take a look at the Superseding
15 Indictment that we were looking at last time versus this
16 Second Superseding Indictment because last time we were
17 here Mr. Hirata, and this is the only one I remember,
18 but showed us and gave us each a copy of this big chart,
19 and the argument as I recall it, and I may be
20 misremembering it, and if I am I'm sure you'll hold it
21 against me, but the argument as I recall it was we need
22 to introduce these individual expenditures because what
23 we have charged in our Indictment, and this is true of
24 the Superseding Indictment, we've charged all of these
25 times of concealment, that there was money that was

1 concealed, that there was money that came in that should
2 have been reported on monthly operating reports but
3 wasn't. And what we want to show you, Your Honor, is
4 that these individualized expenditures that weren't for
5 the operation of SVA they go to show that when he
6 concealed this income, he had motive to do it, and that
7 motive was he was going to use it on something that the
8 bankruptcy creditors wouldn't have been happy about, and
9 so that's why he concealed it. As I understand it, that
10 was basically their argument for why the evidence of
11 these personal expenditures ought to come in.

12 And in the context of the Indictment where
13 they had actually charged counts of concealment and
14 counts of failing to report financial transactions
15 that's an entirely different analysis than this
16 Indictment, because in this Indictment we don't have a
17 single count of concealment or a single count of failure
18 to disclose a financial transaction taking place during
19 the bankruptcy. And what I tell you, Your Honor, is
20 Count 1, that first prong with the million dollars, is
21 qualitatively different than that. That was about
22 reporting his annual income. That money was spent
23 before the bankruptcy was ever declared. That's not
24 about concealment in order to hide an asset or something
25 like that. It's qualitatively different than the

1 concealment and false items that in the Superseding
2 Indictment comprise Counts 2 through 12. And because we
3 don't have that, this analysis is different. This isn't
4 a motion to reconsider the prior motion. This is we
5 have a different Indictment, and where we have a
6 different Indictment we have a different 404(b)
7 analysis, and the reason we have a different 404(b)
8 analysis is because what's intrinsic is different if
9 what's charged is more narrow. Something that might be
10 intrinsic to a concealment count is not necessarily
11 intrinsic to a false statement where you left SVA off of
12 the SOFA, okay?

13 The government's first argument in their
14 opposition to our motion, and really it seemed a more
15 robust argument, was that this was intrinsic. But, Your
16 Honor, where -- the evidence, the elements that they
17 have to prove in order to prove Count 1 as to SVA are
18 pretty simple. And what we'll see is at no point is
19 later expenditures inextricably intertwined with that.
20 First they have to prove there was a bankruptcy
21 proceeding; second, that he made a statement, that is,
22 he listed here his failure to disclose in response to
23 question 18 in the Statement of Financial Affairs
24 Skyline Ventures Associates. I'm looking right now,
25 Your Honor, at what is in their opposition in a footnote

1 on page 2, listing of the elements. I believe that
2 comes off of a proposed jury instruction.

3 The third element is that the declaration
4 contains some material fact. And SVA, as an entity
5 that -- they make some argument that, hey, leaving SVA
6 off as an entity was a material fact. But those
7 personal expenditures don't demonstrate that, Your
8 Honor. The personal expenditures aren't necessary to
9 demonstrate that, they're not intertwined with that. If
10 this is an entity that owned and operated, they can
11 demonstrate that, and, Your Honor, they can demonstrate
12 it through the monthly operating reports that were filed
13 where Skyline Ventures is listed. There's no need, nor
14 is it inextricably intertwined, to say, hey, in order to
15 prove that SVA was material we have to show these later
16 personal expenditures.

17 Fourth, the declaration was false in whole
18 or in part. They won't be proving -- the personal
19 expenditures won't go to prove that it was false in
20 whole or in part. The defendant made the declaration
21 knowingly, and the defendant made the declaration
22 fraudulently. Those are the elements.

23 And the declaration we're talking about
24 here, Your Honor, the fraudulent intent is they have to
25 demonstrate that Mr. Diehl intended to defraud by

1 failing to list SVA, not this uncharged theory of he
2 intended to defraud by having SVA be a subterfuge.
3 That's not the intent to defraud that we're examining
4 when we're examining whether these expenses are proper
5 under 404(b). The intent to defraud is the intent that
6 they need to prove for the charges they've actually
7 brought, and the charges they've actually brought are an
8 intent to defraud by failing to disclose SVA.

9 In their opposition they also, aside from
10 arguing it's intrinsic, they also sort of do a laundry
11 list of 404(b) purposes. If you look at their 404(b)
12 motion they say, hey, these personal expenditures were
13 relevant for planning, to show planning. Again, the
14 planning they would have to show is a planning to fail
15 to list SVA on the SOFA. So now how does expenditures
16 from SVA, how do later personal expenditures from SVA
17 show planning to fail to list the SOFA -- or to fail to
18 list SVA on the SOFA. SOFA being Statement of Financial
19 Affairs, I apologize if that acronym is ...

20 Preparation, same thing, Your Honor, later
21 expenditures don't show preparation to fail to list SVA
22 on the SOFA.

23 Knowledge, later expenditures don't show
24 knowledge that SVA wasn't listed on the SOFA. In fact,
25 we'll come back to that, and what you'll see is, if

1 anything, those expenditures show -- the expenditures go
2 the opposite direction in terms of relevance.

3 Intent, and the government -- I think this
4 is important, Your Honor, because if you look at the
5 intent that they have identified in their opposition,
6 and this is on page 11, the last page of their
7 opposition. They say, Indeed, such acts operate to
8 prove multiple proper purposes under Rule 404(b),
9 including -- and this is where we get the laundry
10 list -- defendant's planning, preparation, knowledge,
11 and intent to conceal assets to defendant's benefit and
12 to the detriment of creditors and the integrity of the
13 bankruptcy system. That's the intent that they're
14 arguing in their motion they will demonstrate with these
15 other expenditures. And that intent, Your Honor, when
16 they had a case that included concealment, that intent
17 might have been an intent -- you ruled it was an intent
18 that was proper, but that intent has nothing to do with
19 the intent to fail to list SVA. Saying, hey, they --
20 this will show intent to conceal assets. Concealing
21 assets is itself uncharged. So what they would be
22 saying is this is -- this shows intent to commit yet
23 another uncharged crime because that's not charged here.
24 It's two layers of intent away. And they haven't cited
25 any case to suggest that they can introduce 404(b)

1 evidence to prove intent to commit another uncharged
2 crime to some end that's not articulated in this motion.
3 So the intent that they have identified, the intent to
4 defraud they've identified in their motion under 404(b)
5 is not the intent that they're required to prove, and
6 it's not a proper purpose under 404(b).

7 I want to take up the intent to defraud a
8 little bit, Your Honor, if I may. I know I've been
9 going for a while, we promised you we would take under
10 two hours, and I'm still confident we'll do that very
11 easily.

12 THE COURT: We have all day if you need it.

13 MR. WASHBURN: Don't say that, Your Honor,
14 that's dangerous.

15 THE COURT: Well, it's important that we get
16 these issues resolved and that you know going forward,
17 so take whatever time you need to make sure you fully
18 address the issues.

19 MR. WASHBURN: Yes, Your Honor.

20 Your Honor, this document is Defense
21 Exhibit 146, and what this is -- in the bankruptcy
22 proceeding this document was filed, as you can see, in
23 late September. An Unsecured Creditors Committee was
24 formed, and that Unsecured Creditors Committee sent this
25 to Mr. Diehl's attorney and it became a stipulated

1 motion of Mr. Diehl and the Unsecured Creditors
2 Committee in September. And what -- the importance of
3 this stipulation, Your Honor, is it says -- they
4 stipulate to the entry of an order permitting the
5 Committee's examination of the following entities. And
6 if you look at this, these are a bunch of entities that
7 show up on the SOFA in response to question 18 and other
8 related entities, and you'll see, because I've
9 highlighted it for you hopefully -- to help hopefully,
10 Skyline Ventures Associates. So as of September 27th,
11 Skyline Ventures Associates is listed here as what they
12 call -- let me look at Exhibit A -- a closely-held
13 entity. And the definition of a closely-held entity
14 here on Exhibit A, which I think is around page 5, let's
15 see here, Your Honor, closely-held entity is an entity,
16 I believe, in which he has an interest, or with which
17 he's had a business relationship.

18 And the important part here though, Your
19 Honor, is on page 6 under documents to be produced. And
20 what you see is that Mr. Diehl stipulated, along with
21 the Unsecured Creditors Committee, to an order requiring
22 him to produce virtually every financial record that you
23 could request from SVA. I've highlighted items 1, 2, 7,
24 and 10 -- well, as you go through this you see he's
25 agreeing to provide all statements, all cancelled

1 checks, all check registers for any of the closely-held
2 entities -- for any bank accounts in which the debtor or
3 closely-held entities have had any interest or any
4 signatory authority. So he's agreeing, and he
5 stipulates, Your Honor, that SVA is one of those
6 closely-held entities. It's on that first page.

7 And if you go to page 5, paragraph 2 it says
8 the closely-held entities means all entities in which
9 debtor has had an equity interest from any time six
10 years preceding the petition to the present, including
11 the following, and Skyline Ventures Associates is listed
12 there. So as of September 27th of 2012 Mr. Diehl has
13 stipulated that Skyline Ventures Associates is an entity
14 that he controls and that he'll turn over all those bank
15 records.

16 Next, Your Honor, I would like to pass up
17 Exhibit 152. So Exhibit 152 here, Your Honor, this is a
18 string of e-mails, and I'll represent to you that it
19 starts off, I believe, if you go to page 3 and 4, Engels
20 Tajada, who's a lawyer is now at Holland & Hart, at that
21 point he was at Snell & Wilmer, and he was one of the
22 two lawyers who represented the Unsecured Creditors
23 Committee. And Jimmy Anderson was a lawyer -- who is a
24 lawyer who now works at Clyde, Snow & Sessions, but at
25 that time was at the firm of Miller Guymon, which no

1 longer exists. He worked alongside Blake Miller in this
2 case. What you'll see is that this e-mail chain starts
3 with Mr. Tajada sending a copy of a protective order and
4 that document we just looked at, the 2004 order, the one
5 where SVA is listed as an entity which they'll provide.

6 And the first thing I've highlighted is on
7 page 3 of this, first in time, not first in the paper of
8 this the way these e-mails get printed out, you'll see
9 that Mr. Anderson here on September 26th, so the day
10 before that was actually filed, starts arranging for
11 production of those categories of documents, and I've
12 highlighted it. He talks about, we're able to produce
13 by this Friday responsive items to ... and then he lists
14 7, 10, 12, 13 and 15. Those are those paragraphs in
15 that 2004 order that dealt with specific things. 7 I
16 think is the financial statements. So he's saying,
17 look, we can produce the financial statements by this
18 date, and then produce by October 12th documents
19 responsive to items 1 and 2. And, importantly, items 1
20 and 2 were those bank statements and records.

21 And then as you go forward a bit, Your
22 Honor, I bring you to the first page because there's
23 some back and forth. And then on October 2nd
24 Mr. Anderson -- there's back and forth about this
25 production as they're attempting to get documents in

1 place to produce to the Unsecured Creditors Committee.
2 By the way, these are items for all those entities
3 listed on that order in the 2004 order which includes
4 Skyline Ventures Associates.

5 And this last paragraph on page 1 asks for
6 the bank statements. We have numerous binders of bank
7 statements for the various entities. And the job is
8 just too big for the debtor and his assistant. We could
9 have a copy service come and do it if you want at the
10 expense of the Committee. Do you have a preferred copy
11 company you would like us to work with. So here's
12 Mr. Diehl -- Mr. Diehl's attorney -- and at this point,
13 Your Honor, if we're -- I think everybody here knows the
14 way these things work. Mr. Diehl has attorneys who are
15 representing him and they manage the production and they
16 work with him to get these documents. And here what you
17 have is the attorney saying, look, we have so many
18 binders with so many bank statements, if you want to
19 send a copy company out, tell us who it is and we'll
20 work with them.

21 And Mr. Tajada responds back and says let me
22 look into the company. So at this point what Mr. Diehl
23 knows is that he has stipulated to an order requiring
24 him to disclose SVA and that his attorney is working
25 with them, and we know his attorney is working with them

1 because some later e-mail chains that I'm not going to
2 go into today show that when they say they have these
3 binders, they're all at Mr. Diehl's home office, and
4 he's just saying, hey, send a copy company up to my home
5 office. So Mr. Diehl's working with his attorney and
6 saying here they all are, it's a big job, we can't do
7 this much copying, is there somebody -- could we send
8 somebody up to come copy them. That's on October 2nd.

9 So if we can just stop right there for just
10 a moment, Your Honor, the government -- again, the
11 intent to defraud we're talking about has to be that
12 Mr. Diehl intended to defraud by failing to list SVA on
13 that Statement of Financial Affairs. But what we see
14 here is by late September Mr. Diehl is disclosing SVA
15 and agreeing to give records. We looked at 2015.3, Your
16 Honor, that bankruptcy rule, you'll recall that it
17 required that all he needed to disclose was every six
18 months a periodic report that would have listed the
19 profitability, the operations, and something else. I
20 forget, Your Honor, I apologize. Here he's agreeing to
21 produce way more than that and he's actively involved in
22 working with his attorney to produce way more than that.

23 And so then you ask yourself, well, wait a
24 second, if that's the case, what do personal
25 expenditures show about Mr. Diehl's intent to defraud?

1 You'll recall here, Your Honor, in this chart that the
2 government has these personal expenditures and they
3 show -- and they, I assume, are attempting to introduce
4 personal expenditures throughout the whole time period
5 to show, hey, Mr. Diehl intended to defraud, not a
6 general intent to defraud by using SVA as a subterfuge,
7 as they claim in their opposition, but the intent to
8 defraud again tacks back to what's actually charged in
9 the Indictment, which is, the intent to defraud by
10 failing to list SVA on the SOFA.

11 If you compare what situation would the
12 creditors have been in, what would have been different
13 on October 2nd when Mr. Anderson was sending this
14 e-mail, what would have been different? Well, at most,
15 under the law, they would have gotten one of these
16 periodic reports of SVA. And other than that, Your
17 Honor, the answer is basically nothing. The
18 creditors -- so if you're sitting there on October 3rd,
19 there is no difference between the amount of information
20 a creditor had on October 3rd in a world in which
21 hypothetically Mr. Diehl puts SVA on that SOFA versus
22 the actual historical world of what happened, no
23 difference whatsoever.

24 What's important to note here, Your Honor,
25 what the evidence will end up showing is on that 2004

1 order all of those entities that had listed SVA on, the
2 unsecured creditors hadn't received records for any of
3 them up to that point. So these productions that
4 Mr. Anderson is talking about in this e-mail with
5 Mr. Tajada, that's the first time that there was any
6 production to the unsecured creditors. So it's not even
7 as if they would have gotten -- if you compare SVG which
8 was listed on the SOFA to SVG (sic) which was not, the
9 creditors got the same category of documents at the same
10 time as they would have gotten.

11 Now, this is the point, Your Honor, where I
12 make what may look like a little bit of a perverse
13 point, which is this: The government claims, or has
14 evidence of, personal expenditures from April all the
15 way through confirmation and beyond through SVA. But
16 that undermines their theory that those personal
17 expenditures show that Mr. Diehl was intending to
18 defraud by not disclosing SVA on the SOFA. How does it
19 undermine it? On October 3rd, just to pick the date
20 after this e-mail, Mr. Diehl knows that he has an
21 obligation to turn over those bank records, is actively
22 cooperating with his attorney to turn over bank
23 statements of SVA, the bank statements that will form
24 the exact same basis of these personal expenditures that
25 the government wants to introduce to show his intent to

1 defraud. And what does he do? Does he all of a sudden
2 stop and say, uh-oh, now that I've got -- now that SVA
3 is out there, I better not do personal expenditures
4 through SVA anymore. No. Those personal expenditures,
5 according to their chart, continue. What does that tell
6 us for present purposes? That they're irrelevant to his
7 intent to defraud by hiding SVA. If he's making
8 personal expenditures through SVA, is their theory,
9 after SVA's been fully disclosed, it's obvious that they
10 don't demonstrate some sort of motive to hide SVA. He
11 makes personal expenditures before SVA is disclosed, he
12 makes personal expenditures after SVA is disclosed.
13 Those personal expenditures don't show anything about an
14 intent to hide SVA. They may show something about an
15 intent to fail to report those concealed assets which
16 were in the original Superseding Indictment, but they
17 don't show anything about the charges in this
18 Indictment.

19 I kept trying to think about a good analogy,
20 and maybe this one's not going to be productive at all,
21 but the analysis is a kid is saying I don't want my mom
22 in the car, and you think, well, he doesn't want his mom
23 in the car because he's going to speed, and then his mom
24 gets in the car and he speeds anyway. Well, maybe he
25 just didn't want his mom in the car because she doesn't

1 like the same radio station. It's not because he's
2 trying to hide the speeding. And that's what's going on
3 here, Your Honor. These personal expenditures do
4 nothing to show Mr. Diehl's intent to defraud by failing
5 to disclose SVA. A different -- if we were on a
6 different indictment, Your Honor, and maybe even if we
7 were on this Superseding Indictment instead of a Third
8 Superseding Indictment, that's a different analysis, and
9 that's why we brought this motion because the intent to
10 defraud here is very different than the intent to
11 defraud in a different context.

12 Your Honor, I want to pass up now
13 Exhibit 156. Your Honor, I think this is one of those
14 exhibits where we probably need to talk to the
15 government because they have a version of it and we have
16 a version of it. This is an excerpt. Mr. Diehl, two
17 days after that October 2nd date, sat for a 2004 exam.
18 And in our motion we cited some parts of the 2004 exam
19 that we thought were relevant, and then the government
20 cited some parts that they thought were relevant. They
21 talked a little bit about the million dollars, and we
22 can talk about that. I wanted to pass this up to you,
23 Your Honor, because I think seeing -- this is the
24 section where SVA gets discussed. There's a bunch of
25 pages before this where they talk about other entities,

1 but then you can see starting on page 76, they're
2 looking -- by the way, when they say it's not on here,
3 they're looking at a chart that I believe Mr. Diehl's
4 assistant prepared for a 341 hearing, and it's an
5 exhibit to this, I didn't put it on here, but they're
6 looking at a chart. And the attorney for the Unsecured
7 Creditors Committee says, hey, what's this Skyline
8 Ventures Associates?

9 Mr. Diehl says, It's an entity owned by my
10 daughters, and, you know, 50 percent by each of my
11 daughters. And we set it up in anticipating possibly
12 doing some developing in the future, and it currently
13 doesn't have any projects, it doesn't own any projects.

14 And then it -- starting on page 78 it says,
15 you know, the Unsecured Creditors Committee clearly saw
16 exactly what I was talking about because on page 78 it
17 says, Okay. Skyline Ventures right now, according to
18 the monthly reports that you've been filing, has been
19 making payments to you; is that correct?

20 And he says, That's correct.

21 This is important for a couple of reasons,
22 Your Honor. First of all, like I said, SVA wasn't
23 hidden, it wasn't listed on the SOFA, but SVA was never
24 hidden. It was disclosed exactly where the Unsecured
25 Creditors Committee saw it, which was the monthly

1 operating reports that listed it as the income. And, as
2 I said, if you look through all of the monthly operating
3 reports during the pendency before the confirmation of
4 the plan, SVA isn't just a source of income, it's the
5 source of 96 percent of the income. So the Unsecured
6 Creditors Committee here is saying, hey, we saw that,
7 they're making payments to you, right? What are those
8 payments for?

9 Consulting work.

10 And if I can skip to the middle of page 79,
11 it says, When you say consulting, then you mean the same
12 services you were providing through your business before
13 you stopped doing work through Wasatch Pacific. So here
14 the Unsecured Creditors Committee is saying, look, this
15 entity that's owned by -- this is what the unsecured
16 creditors are saying, this entity that's owned by your
17 daughters that wasn't on the SOFA, but here we are
18 asking about it, what's it doing? And he discloses
19 exactly what it's doing. It's doing the same things.
20 He says yes to that, the same services you were
21 providing through your business before you stopped
22 through Wasatch Pacific. So, in other words, they know
23 that this is the new iteration of Wasatch Pacific and
24 they know Wasatch Pacific was the business Mr. Diehl ran
25 all of his business through.

1 He said, Yes. I guess -- when you say
2 providing, I always did this stuff. I did it for
3 myself. I didn't do it for other people. And now I'm
4 doing some of the consulting work, you know, for other
5 people and getting paid for that.

6 And then they ask, Who are you doing that
7 for?

8 And he says, The project that's paid in the
9 last six months has been a development by the name of
10 Draper Holdings.

11 When we were here last time there was a
12 check that Mr. Hirata held up which was an \$80,000 check
13 in about July from a company called Boulder Ventures to
14 Skyline Ventures Associates that was one of the charged
15 counts of hidden in an undisclosed payments into Skyline
16 Ventures Associates. And here he is in his 2004 exam
17 saying none of those guys have been paying me. Draper
18 Holdings and Boulder Ventures Associates, the same
19 owner. Boulder Ventures is a holding company. Draper
20 Holdings is a subsidiary. And they say, Okay.

21 It's transferring the development out there
22 that I've been taking all the heat in the paper about
23 conflicts of interest down in Draper. But, anyway, it's
24 the developer in that that's paying me consulting fees.

25 And they ask, And they pay it to Skyline

1 Ventures?

2 And he says, Yes.

3 Skipping ahead a little bit because if you
4 can turn to page 88 he discloses more about what Skyline
5 Ventures is. And what did your daughters invest in
6 Skyline Ventures? What did they do to obtain 49
7 percent -- or 50/50? What did they do for their 50/50
8 shares? What have they contributed?

9 They contributed some of their time, but we
10 really haven't started to do anything. My bankruptcy
11 kind of happened and my daughter was going to move from
12 Dallas to here, maybe set up an office. Stopped her
13 from doing that when I filed bankruptcy. So I'm waiting
14 to sort all of this out.

15 Skyline Ventures is housed out of your home?

16 Yes.

17 On the next page. Now, Kim is your
18 assistant at Wasatch Pacific. Does she work for Skyline
19 Ventures?

20 Yes.

21 It's basically the same company just
22 continued under a different name?

23 No. We're actually trying to do some new
24 work. There really isn't too much to do on the other
25 stuff, that is the prior projects, because it's just

1 sitting.

2 And then this is another important point
3 here, Your Honor. On page 90, All right. Tell me
4 generally, how do you plan to propose a plan?

5 Your Honor, the government has in the past
6 said, oh, look, when you said no, we really haven't
7 started anything with Skyline Ventures Associates, what
8 they're talking about here is his plan to get things
9 going. He does describe, Your Honor, that if Skyline
10 Ventures Associates he says -- he's doing -- if you go
11 back to page 79, he says, You know, we're working on
12 several projects right now, but like I tried to tell you
13 yesterday -- the billing records will show that there
14 was a phone call that wasn't recorded between the
15 Unsecured Creditors Committee lawyers and Mr. Diehl and
16 his attorney -- when I talked to you, it takes a couple
17 of years before you really generate any cash flow from a
18 project because there's a lot of work to do. And that
19 makes sense. These are big developments. He says, so
20 while we're in that phase we're out there trying to find
21 some things that I can do consulting-wise to try to
22 bring in some income and keep us afloat. So he
23 described earlier, Your Honor, that he's in the phase of
24 let's try and keep us afloat, and here he's talking
25 about, well, what projects do you have. And Mr. Tajada

1 asked him, Tell me generally how do you propose a plan,
2 how do you plan to propose a plan? This is the very
3 first part, Mr. Tajada is saying what are you doing
4 here? You've got this Chapter 11, what are we doing
5 here? Well, if in fact we can be successful in
6 eliminating a large portion of the debt that's on here,
7 my plan would be to try and formulate a plan over the
8 next five years where we would pay everything back. We
9 would have to do that based on a percentage of income
10 that I bring in.

11 And then asked, Okay. You don't have any
12 other employment other than working for Skyline right
13 now; is that right?

14 That's correct.

15 So now they know that he's only working for
16 Skyline Ventures Associates.

17 And if you go two more pages ahead,
18 question -- and this is on line 6, page 93 -- The source
19 of your plan now would be -- I'm sorry, what was the
20 source of the plan payments?

21 Same thing. I had to go out and do
22 development of projects. The same thing as he had
23 declared bankruptcy back in the '90s and they asked how
24 he paid it off then.

25 Okay. Is there any property that you would

1 liquidate to fund your plan?

2 No. We do all new projects that are outside
3 of these.

4 So they would all be for new service, right?

5 Yes.

6 Would you do the projects under the existing
7 companies or under the new companies?

8 We would -- right now my thinking is that we
9 would manage it under Skyline, but we would be no
10 different than we had done here. We acquire a piece of
11 property, another LLC would be set up in order to hold
12 that, and the interest would be held, depending on how
13 we funded it.

14 And he says, Okay.

15 And then he says, I don't think we would do
16 it any different that we've done in the past.

17 I apologize, somehow I've contrived to
18 misplace my outline. Your Honor, I went through all of
19 that because, again, the question is you have these
20 personal expenditures. After he disclosed all of that
21 about SVA, they know it's his only employer, they know
22 it's the entity he's going to use to pay off the plan.
23 And the government's theory seems to be that somehow or
24 another he thinks he's hiding things in SVA. If this
25 were a case where there were another entity called, you

1 know, Skyline Group Associates and all of the personal
2 expenditures went through that, but Skyline Ventures
3 Associates was what he told the Creditors Committee
4 about, I get how failure to list the Skyline Group
5 Associates might be relevant to some sort of intent.
6 Here, Your Honor, in this case, all of these personal
7 expenditures are not relevant at all to show his intent
8 when he listed on the SOFA said he didn't report SVA.

9 Your Honor, there's a qualitative difference
10 between everything he did list on the SOFA and SVA,
11 which he did not, and that is, he didn't have on paper
12 any ownership interest in SVA. As it's noted, his
13 daughters owned it 50/50. And the government's theory
14 is, well, he was a managing executive of it. And,
15 again, we have to ask what do these later personal
16 expenditures far down the road have to do with showing
17 that he intended to defraud by failing to list SVA when
18 he was a managing executive of it. And they haven't
19 articulated that. Instead, what they argued, what the
20 intent to defraud would show is this general subterfuge
21 intent to defraud, you know, hiding things from
22 creditors. And, again, that's not charged in this
23 Indictment. So the intent that they've articulated they
24 plan to prove is not at all what's charged in the
25 Indictment.

1 Again, I think it's worth comparing, and I
2 may be belaboring the comparison, between the prior
3 Indictment and your ruling on that prior Indictment and
4 why we think the ruling should be different here. In a
5 prior Indictment they alleged as a concealment and a
6 false statement that there was a \$50,000 transaction
7 that came in on December 23rd. And if you're alleging,
8 okay, on December 23rd a \$50,000 transaction comes in,
9 and then we want to show expenditures. That makes a
10 certain amount of sense. You say, okay, if you're
11 alleging that he concealed that 50,000 and he spends it
12 on a whole -- he doesn't report it and he spends it on a
13 whole bunch of things, all right, that makes a certain
14 amount of sense. If the allegation is, hey, at some
15 point long before failed to disclose SVA on a SOFA
16 and -- but shows up all sorts of other places, that
17 personal expenditure doesn't have probative value to
18 that intent. The way that it might have probative value
19 to the intent to conceal the asset or fail to disclose
20 in those charges that were in the Indictment but no
21 longer are.

22 Your Honor, the government seems to from
23 time to time -- it's in every iteration of the
24 Indictment, Mr. Hirata said it during his argument last
25 time, get up and say the price of bankruptcy is full

1 disclosure. And it actually isn't. It's compliance
2 with the rules. And I think that's important because a
3 lot of the things that -- for example, the government
4 had one exhibit to their opposition, and it was a list
5 from that same document where there were questions about
6 Skyline Ventures Associates. And in that they ask, hey,
7 we see your income of \$376,000. What is -- what was the
8 source of that income that you made in 2011? And
9 Mr. Diehl said, I can't tell you that, you would have to
10 ask Brent that. Brent being Brent Daines, his
11 accountant. He had been identified earlier.

12 And the government says, look at that, he's
13 deflecting, I think deflecting is the word they use,
14 deflecting what's the source of that income.

15 First of all, Your Honor, it's a little bit
16 hypocritical of the government. We've now had three --
17 when we started off, the first tax count, and the tax
18 count asked -- said that there was tax due and owing on
19 Mr. Diehl's tax return for 2011, the evasion count
20 that's just been dropped out. And you'll recall that
21 the first iteration of that said there's tax due and
22 owing of 300,000. And then they interlineated it down
23 to 190,000. And then they dismissed it. And it's my
24 understanding the reason they dismissed that evasion
25 count is because they couldn't prove tax due and owing

1 because they couldn't prove, as you look at all the
2 records, what Mr. Diehl's income is for 2011. So if the
3 IRS revenue agent who is assisting in the prosecution
4 team, who has as much time, presumably, as they need to
5 look at these documents before they make the monumental
6 decision to indict Mr. Diehl on tax evasion, can't get
7 it right and can't get it right two different times, the
8 fact that they are saying that Mr. Diehl is deflecting
9 by saying, gee, I don't know, ask my accountant feels to
10 me hypocritical. But more to the point, Your Honor,
11 it's honest.

12 I'm going to show you a document, this is a
13 Government Exhibit 12-15. And this is an e-mail chain
14 on April 12th. The SOFA was filed on April 13th. And
15 just to identify everybody who participated in it,
16 there's someone named Kim Iba. Kim has a bunch of
17 different last names that you'll see in the record.
18 There's Kim Iba, Kim Monroe, Kim Arcade, that's all the
19 same person. Kim Iba is what she was going by at this
20 time. She was Mr. Diehl's personal assistant. And we
21 read a little bit ago that she worked out of his home
22 office. There's Brent Daines, that was Mr. Diehl's CPA.
23 And you'll notice all of those e-mails are between those
24 two and they're cc'g Mr. Diehl. And the e-mails are
25 Ms. Iba on April 12th sends a document saying e-mailing

1 profit and loss statements. Please look these over.

2 And then Mr. Daines responds, looks better
3 on the income side. Reprint the income statement and
4 collapse the account to not show the sub-accounts.
5 Let's see if that cleans it up.

6 And then Ms. Iba says, Yep, shows some
7 income. However, in 2010 shows a huge net income, and
8 the tax return shows a deficit of 659.

9 So what you see here is Mr. Diehl's
10 bookkeeper -- I call her an assistant, but she's a
11 bookkeeper. She does significant amounts of
12 bookkeeping. We've exhibited her CV. I didn't bring it
13 to show it to you, but that's who she is. So the
14 bookkeeper and the CPA are going back and forth with
15 financial statements. And you saw that the CPA gave
16 some specific directions on how to present those
17 financial statements.

18 And then if you look at a couple of pages
19 back here, Your Honor, I think it's the fourth page
20 back, you have a profit and loss statement for 2011,
21 dated April 12, 2012. This was the attachment that
22 Ms. Monroe shared. And it says 376,706.83. Now, what
23 shows up on the SOFA is 376,708.83, I think. I think
24 there's a \$2 transcription error between this document
25 and the SOFA. But that's the number. And so when

1 Mr. Diehl says when he's asked, hey, where did that
2 income come from, and he says, I can't tell you, you'd
3 have to ask Brent, my accountant, he's saying that
4 because Brent, his accountant, is the one who came up
5 with it. And when you say, I can't tell you, again,
6 Your Honor, that hypocrisy of the government in their
7 opposition saying that's him deflecting, when they
8 themselves spent months and couldn't come up with an
9 accurate income number is pretty astounding. Mr. Diehl
10 gave them an honest answer to that.

11 And, Your Honor, also I would note, just as
12 an aside, the false statement that they allege in kind
13 of the prong -- the first prong of Count 1, that million
14 dollars that failed to be reported, the income that
15 needs to be reported, this is the same year, same year
16 as his tax return for 2011. The government just
17 dismissed the evasion count, I assume, because they
18 can't prove Mr. Diehl had tax due and owing, and I
19 assume because they couldn't prove he had tax due and
20 owing because he didn't have income. And the thing he's
21 asked to report is gross income. And here we have -- he
22 reports whatever his accountant gave, this 376. I'll
23 just be interested to see what the government's theory
24 is on his income if they couldn't show tax due and owing
25 because he didn't have income for 2011 for tax purposes.

1 Showing that Mr. Diehl was attempting go defraud by
2 failing to report this million dollars or by reporting
3 the 376, Your Honor, I think just shows again that
4 there's kind of a lack of clear understanding of intent
5 to defraud.

6 Your Honor, I've been talking quite awhile,
7 just to reiterate what I think are the most important
8 points: This is a very narrow case. It may have a
9 really broad theory behind it, but that's not what we
10 judge 404(b) by. You won't find 404(b) cases that say,
11 hey, this is relevant to show intent to defraud of their
12 theory, uncharged theory. What you'll see is is this
13 relevant to prove an element of the charged crimes. And
14 here the only charges, the only charge that I think is
15 relevant to -- that they intend to offer these personal
16 expenditures for is an intent to defraud by failing to
17 list SVA on that SOFA. That's it. It's not this broad
18 free-ranging intent to defraud. It's not the same
19 intent to defraud we have with the concealment and false
20 statement case of -- false statement being failing to
21 list specific income items during the time period
22 contemporaneous with those personal expenditures.

23 Obviously, Your Honor, if you have any
24 questions now, I'm happy to take them.

25 THE COURT: Taking your arguments and

1 putting them in concrete terms that we can apply, under
2 your argument what -- how would we characterize, how
3 would we describe the evidence you believe should be
4 excluded? Categorize them in --

5 MR. WASHBURN: First of all, Your Honor, I
6 would say that any -- that expenditures out of SVA that
7 are not charged in the Indictment are other acts. And I
8 think all of the -- what we asked for in our original
9 motion was that it be excluded evidence that Mr. Diehl
10 made personal expenditures out of Skyline Ventures
11 Associates. And we also ask that it be excluded this
12 use of an American Express card that was paid by SVA.
13 So that's what we would ask to be excluded is those
14 personal expenditures.

15 I apologize, I told you I was done, but I
16 want to make one last point, and that's the 403 point,
17 if I may. Your Honor, what we've been hearing over the
18 last few days is that the government has -- is serving
19 new witnesses, they're amending their witness list to
20 add a whole bunch of additional witnesses. Those
21 additional witnesses apparently are here to testify
22 solely about these personal expenditures. They're going
23 to bring people in, Mr. Diehl's ex-wife, Mr. Diehl's
24 ex-wife's brother-in-law to talk about, oh, Mr. Diehl
25 paid for my family to take a flight on the X, or he paid

1 for this or that or the other. I would estimate that a
2 third of the witnesses that we're going to hear from are
3 going to have some -- are primarily going to be just to
4 talk about these personal expenditures. And that's the
5 sort of distraction from -- you know, we're going to
6 have this jury hearing -- if we let this in, all of a
7 sudden we're going to have Mr. Diehl's ex-wife come in
8 and say, yep, Mr. Diehl bought me this necklace and it
9 came out of SVA. And what does that have to do with the
10 decision this jury is going to be asked to make, which
11 is, should Mr. Diehl have listed SVA on his SOFA. And
12 all of a sudden you've got his ex-wife saying, yeah, he
13 bought a necklace for me at Christmas 2012. That's the
14 nature of the evidence that the government, as I
15 understand it, and I -- obviously I'm not -- I may be
16 mischaracterizing it, I'm not doing that intentionally,
17 but that's my understanding is they're intending to call
18 a series of witnesses to do nothing but that. And under
19 403, even if this were -- it had some probative value to
20 that intent of what was going through his head back in
21 April 2012, and I don't think it does, but even if it
22 did, the possibility of confusing the issue, the
23 possibility that the jury will hear that and say, wow,
24 he's spent all this personal money out of SVA, that
25 sounds wrong, and not connect that to, wait a second,

1 that's not the question I'm being asked to consider.
2 I'm being asked to consider did he act as an intent to
3 defraud when he failed to list SVA on the SOFA, a very
4 narrow question. I think the risk of confusion is high
5 under Rule 403.

6 THE COURT: Thank you.

7 MR. WASHBURN: Thank you, Your Honor.

8 THE COURT: Mr. Hirata.

9 MR. HIRATA: Pardon me, Your Honor, I just
10 want to get some water.

11 THE COURT: Sure, go ahead.

12 MR. HIRATA: Judge, the United States'
13 theory has not changed. It's very clear, it's been
14 stated throughout all the Indictments in this case, that
15 the defendant created and used SVA as a subterfuge to
16 funnel and spend money throughout the plan confirmation
17 period, disclosing some, not other funds, and as to
18 undisclosed funds using them for personal expenses.

19 Your Honor, the -- what ties together all of
20 the evidence that Mr. Washburn has pointed to from his
21 side of the case, and that would include bankruptcy
22 filings, 2004 examinations, all of those items pertain
23 to intent, intent. And intent is a fundamental element
24 under 152 sub (3), false declaration. And that's really
25 what's at issue here. What was in Terry Diehl's head at

1 the time he filed on April 13, 2012, the statement of
2 financial disclosures and responding to question 18 and
3 not identifying Skyline Ventures Associates, Inc. So
4 how do we ascertain intent?

5 THE COURT: Let me stop you for just a
6 moment. What is the intent that the government is
7 required to prove?

8 MR. HIRATA: It's the intent not to list SVA
9 in response to question 18. Did he act with fraudulent
10 intent when --

11 THE COURT: That's the part I want you to
12 focus on, the fraudulent intent part.

13 MR. HIRATA: Okay, and I'll do that. And
14 let me quote from *Huddleston* as a starting point.
15 Extrinsic evidence may be critical to the establishment
16 of the truth as to a disputed issue, especially when
17 that issue involves the actor's state of mind and the
18 only means of ascertaining that mental state is by
19 drawing inferences from -- okay.

20 So with regard to that fraudulent intent in
21 not disclosing SVA in answer to question 18, you have to
22 consider, as *Huddleston* notes, circumstantial evidence.
23 That would include, as we've alleged in the Indictment,
24 the creation of SVA, not in his name, but in the names
25 of his daughters. You would also need to note prior to,

1 again, the submission, the failure to disclose that a
2 bank account is opened in the name of SVA. He's not a
3 signer on that account. You would also need to note,
4 and this all bears upon his intent not to disclose, his
5 managing up to the point of that filing, SVA running its
6 day-to-day affairs, managing all of the money that goes
7 into that account. It's not his daughters'. They have
8 no hand in the business. And that's the evidence you'll
9 hear at trial. But it's Terry Diehl and Terry Diehl
10 only managing the business, managing the money in,
11 managing the money out.

12 THE COURT: I don't understand the defense
13 to be arguing that that's precluded. That goes to
14 whether or not he was a managing executive.

15 MR. HIRATA: Correct.

16 THE COURT: Okay.

17 MR. HIRATA: Right.

18 THE COURT: Go ahead.

19 MR. HIRATA: Okay. And in addition to that,
20 Judge, that he's the managing executive, it's important
21 to note this: Not only was he the managing executive of
22 SVA, he was SVA. There was nobody else involved in the
23 business, there was -- it's not as though, as
24 Mr. Washburn stated very early in his argument, he
25 called -- he noted that the defendant recognized SVA's,

1 quote, "his employer." That's misleading. He was SVA.

2 THE COURT: Well, but that goes to questions
3 of piercing the corporate veil. Are we going to have a
4 trial about whether or not he disregarded the corporate
5 formalities, whether or not he treated this as a
6 separate entity?

7 MR. HIRATA: No --

8 THE COURT: Because if you say he was SVA,
9 that's the same as saying SVA is not entitled to legal
10 recognition.

11 MR. HIRATA: And I don't mean to say that
12 when I say he's SVA. What I do mean to say is that he
13 and only he was in full control.

14 THE COURT: Okay. That goes to whether he's
15 the managing executive.

16 MR. HIRATA: That's right.

17 THE COURT: I get that part.

18 MR. HIRATA: Okay. That's the managing
19 executive. Okay.

20 So that evidence is relevant to his intent.
21 The events and circumstances leading up to that filing
22 wherein he failed to disclose SVA.

23 Additionally, what else goes to his intent,
24 what other circumstantial evidence bears upon his intent
25 when he knowingly and intentionally failed to disclose

1 SVA? We will put on evidence that following the filing,
2 following the filing he ran money, again, under his full
3 control as the managing executive, through SVA,
4 disclosed only some of that on monthly operating
5 reports, and to the extent he didn't disclose, he used
6 some of that money for personal expenses. That also
7 bears upon his failure to note SVA and fully disclose,
8 and I'll get to full disclosure here in just a bit.

9 THE COURT: Let me make sure I understand
10 what you're arguing. It would be the intent of the
11 government to offer that more money was earned in SVA
12 than was reported on the monthly operating report. So,
13 for example, they reported \$10,000, I don't know if
14 that's the particular instance, but in concept it would
15 be, well, they really earned 15,000, only 10,000 got
16 reported, and the 5,000 was used for personal
17 expenditures.

18 MR. HIRATA: Some of it, yes. That's the
19 theory, that's the argument.

20 THE COURT: I want to make sure that I'm
21 tracking your argument.

22 MR. HIRATA: Okay, fair enough. That
23 occurred, the evidence will show, for I believe it's 11
24 out of the 13 monthly operating reports that were filed.
25 There was undisclosed funds -- there were undisclosed

1 funds, some of which were used for personal expenses
2 that creditors were completely unaware of.

3 So what additional acts following the filing
4 of the petition are relevant to his intent? The
5 statements that Mr. Washburn alluded to in the 2004
6 examination, it's the government's position that there
7 wasn't full disclosure there. He did not inform them in
8 plain terms that it's his business that he exclusively
9 manages and controls, controls all the money coming in
10 and going out of SVA.

11 THE COURT: What does that have to do with
12 the disclosure in the SOFA, as Mr. Washburn calls it?

13 MR. HIRATA: He purposely didn't disclose in
14 the SOFA SVA because --

15 THE COURT: That's the charge, that is the
16 charge.

17 MR. HIRATA: That's the charge. He
18 purposely didn't disclose because that gave him the
19 opportunity to portray SVA in a different manner,
20 something other than what it actually was, that is, him
21 being the managing executive over which he had full
22 control. And I'll give you an example.

23 THE COURT: Let me make sure I understand
24 your argument. So assuming that he had disclosed SVA in
25 the Statement of Financial Affairs, how would that have

1 changed anything that came subsequently? How did his
2 failure to disclose change in any way his interactions
3 with the Creditors Committee and their attorneys?

4 MR. HIRATA: Because at that point they
5 would know that it's actually his company that he's
6 managing, and so when they see these payments coming
7 from Skyline Ventures Associates to him, it would raise
8 a question, well, now wait a minute, so he's paying
9 himself? That doesn't make sense, right? And so that's
10 where he would run into problems and issues. And
11 that's, again, Your Honor, that's the government's
12 theory here is that he purposefully failed to disclose
13 SVA on the front end so that he could control the
14 narrative going forward as to what SVA was, which at the
15 end of the day was something less than what it actually
16 was in operation and as the evidence will come out at
17 trial.

18 Again, Your Honor, if you look at the
19 monthly operating reports, it shows payments going to
20 him in the form of consulting fees from Skyline Ventures
21 Associates. I believe there are a series of checks.
22 And that's what Kim Iba, his bookkeeper, will testify
23 to, that every month they get together, she and the
24 defendant, to ascertain, all right, so what expenses are
25 we going to pay this month. He would then, based upon

1 the total expenses that they were set to pay, would
2 dictate to her the number of checks to write out on the
3 SVA account to himself that he was going to characterize
4 as consulting fees, and those payments, those checks,
5 added up to expenses for that month. That was not an
6 accurate picture of what occurred month-by-month. And,
7 in fact, there was additional money being received into
8 SVA not disclosed to creditors and the bankruptcy court,
9 and that money was used in part for personal expenses.
10 That's all relevant. Again, Your Honor, by not
11 disclosing SVA up front, he gets to control what we
12 believe, and our position is, a misleading narrative
13 relative to what SVA actually is. It's something other
14 than what it is.

15 The 2004 examination, if I may get back to
16 it, yes, he's asked questions about SVA, but he never
17 fully tells it straight up what it is. Right? That
18 it's his business that he exclusively manages and
19 controls.

20 THE COURT: So under your theory of the
21 case, what is it that he should have disclosed in the
22 debtor's examination that he didn't disclose?

23 MR. HIRATA: What I just said, Judge, that
24 it's his business that he exclusively manages and
25 controls. Why? Because that is wholly inconsistent

1 with what he's put on monthly operating reports to date.
2 And so Engels Tajada, who was taking the examination,
3 and Troy Aramburu, who was sitting in on the
4 examination, both lawyers to the Creditors Committee, if
5 they learn the true circumstances, then they have good
6 questions to question the operating reports, because
7 it's all of a sudden, well, now we're really confused
8 because Skyline Ventures Associates, as you've portrayed
9 it in these reports, is something -- is some separate
10 company that's paying you a consulting fee wherein at
11 the end of the day in reality it's your company, you're
12 in full control of it, you're in control of all the
13 money going in and out of it. And, by the way, here's
14 another thing he's not disclosing that the money that is
15 going in and out is not fully being reported on those
16 monthly operating reports. He doesn't even disclose
17 that.

18 THE COURT: Mr. Washburn represents that the
19 Creditors Committee had all of the bank statements. If
20 they had the bank statements, that shows all of the
21 money that was -- are you arguing that there was money
22 that was going into bank statements that were not
23 disclosed?

24 MR. HIRATA: No. But I will say this: What
25 Mr. Washburn has raised is a factual question, because

1 the government will be putting on evidence of the
2 creditors, in particular the lawyers for the Creditors
3 Committee, not being necessarily -- let me back up.
4 That argument, Judge, goes to the argument of what the
5 Creditors Committee should have known, right? So
6 that -- he's saying, hey, all of these records are
7 available, and for whatever reason they didn't either
8 look at them, or they looked at them but didn't pick up
9 on what they should have picked up on, therefore there
10 was full disclosure. Well, Your Honor, the United
11 States' point is this: The jury is entitled to consider
12 all of the evidence that's occurring during this same
13 period, so they can consider the stipulation that
14 Mr. Washburn referred to, the 2004 examination, but they
15 should also be able to consider the monthly operating
16 reports and the money that's coming in and out and
17 what's not being reported. All of that, at least in the
18 United States' view, is relevant to fraudulent intent.
19 It strikes me, Your Honor, that the defense can't have
20 it both ways, to keep out all of this evidence following
21 the filing of the SOFA and to then cherry pick whatever
22 evidence they see fit in an effort to defeat the
23 critical element of fraudulent intent. The jury is
24 entitled to all of that evidence so that it can make in
25 its wisdom a determination as to whether the government

1 has met its burden as to fraudulent intent.

2 He also noted that what does acts of
3 concealment have to do with this? Acts of concealment,
4 Your Honor, go directly to fraudulent intent. Again,
5 you can look at -- again, goes to his motive in failing
6 to report SVA on the front end. It goes to his motive
7 in, again, controlling the narrative as SVA means
8 something other than what it actually was. Acts of
9 concealment also bear upon that because, again, acts of
10 concealment bear upon the controlled narrative that it's
11 something less than what it actually was, as portrayed
12 by defendant. All of that evidence is relevant for the
13 jury's consideration as to that key element.

14 THE COURT: What is the government's
15 contention of the period of time for which that evidence
16 is relevant?

17 MR. HIRATA: From -- so from the filing of
18 that Statement of Financial Affairs --

19 THE COURT: What about before, what about
20 before the filing of the Statement of Financial Affairs?

21 MR. HIRATA: Oh, yes. As I noted, again,
22 it's the steps that he took to set up SVA, that's
23 important, that's relevant because that also goes to his
24 intent. And if he's not putting his name on
25 registration papers, if he's not putting his name on the

1 bank statements, all of that is relevant to his intent
2 not to disclose on the SOFA.

3 THE COURT: So basically from the creation
4 of SVA through what date?

5 MR. HIRATA: The end date, we would submit,
6 is when the plan is confirmed. Because it's up to that
7 entire point that he continues to control the narrative
8 filing monthly operating reports, not fully disclosing.
9 As to what he's not fully disclosing, he is using for
10 personal expenses, personal expenses.

11 THE COURT: Okay.

12 MR. HIRATA: That's the relevance of the
13 personal expense, that's the relevance of the American
14 Express expenses. We're not trying to, for lack of a
15 better description, dirty up Mr. Diehl by showing these
16 discreet personal expenses. But all we're trying to do
17 is prove them up, it's just that. That's our burden.
18 And if we are deprived of calling his ex-wife,
19 brother-in-law, vendors, admitting business records to
20 show that these are, in fact, personal expenses, then
21 that deprives us of the ability to again prove up the
22 critical element of fraudulent intent.

23 I believe that's our position, Your Honor.

24 THE COURT: Mr. Washburn, do you wish to
25 respond?

1 MR. WASHBURN: Yes, Your Honor. The reason
2 I started where I started with what the implications of
3 listing SVA on the SOFA were is to demonstrate that
4 Mr. Hirata talks about setting a different narrative in
5 all of this. Listing it on the SOFA lists Skyline
6 Ventures Associates, Inc., it lists an address, and
7 that's about it. And then you have these operating
8 reports that I talked about that would have been
9 triggered, and then -- and that's it.

10 And when we look at the 2004 order, Your
11 Honor, by the time of the 2004 order that -- the time
12 for a second operating report wouldn't have come. So
13 you have a 2004 order, what does it say? It says
14 Skyline Ventures Associates is a closely-held entity of
15 Mr. Diehl. So when Mr. Hirata says, oh, he gets to set
16 a narrative in the 2004 exam, I have no idea what he's
17 talking about. It's not as if when you list something
18 in the Statement of Financial Affairs in response to
19 question 18 you have to write an essay about who it is,
20 what it does, or anything else. You just list its name
21 and address. There is no narrative, Your Honor, to
22 listing it or not listing it.

23 Mr. Hirata mentioned, I think this is an
24 important part here, mentioned a 2004 exam, and you
25 asked him what ought he to have disclosed that he

1 didn't, and Mr. Hirata listed some things. I don't know
2 how many depositions he takes. I'm not a big deposition
3 guy, Your Honor, I'm mostly criminal. I get into them
4 from time to time. And the number one instruction that
5 you give to a deponent is listen to the question and
6 answer it. And so when Mr. Hirata says, well, he should
7 have disclosed this and he should have disclosed that,
8 what he doesn't show you, because it doesn't exist, is a
9 question that Mr. Diehl didn't answer honestly. They
10 say he should have disclosed it. I guess what they're
11 saying is they should have asked a question and he
12 should have answered it. A 2004 exam isn't where you
13 come in and make a debtor -- you come in and say what's
14 everything that you would want to know if you were us,
15 spill the beans. I suppose you could ask that as the
16 first question. It might draw an objection. But that
17 didn't happen here. And so when they say, hey, he
18 should have disclosed X, Y or Z.

19 You asked, Your Honor, I think it's the key
20 question here, you know, what would have been different,
21 because when you asked him the timeframe, when you asked
22 Mr. Hirata the timeframe, what timeframe do you think is
23 relevant, after the point on that 2004 order where SVA
24 is disclosed, certainly after that point. I think
25 honestly, Your Honor, before that point as well. But

1 the fact that the government is saying the personal
2 expenditures that occur after that point are evidence of
3 his intent not to disclose SVA on the SOFA makes no
4 sense to me. It's been disclosed as a closely-held
5 entity. It's been a subject of whatever questions
6 Mr. Tajada and Mr. Aramburu chose to ask him in the 2004
7 exam and he answered. If they believed that he answered
8 falsely in the 2004 exam, Your Honor, I assume that we
9 would have a count about that.

10 And what this isn't, Your Honor, I think
11 it's important because I kept going to the intent not to
12 list it, and when I heard Mr. Hirata up here talking, it
13 sounded like he was talking about a conspiracy case or a
14 scheme case or something like that. That's not what
15 this is. This is a false statement case. And so the
16 intent isn't intent to run a grand scheme, it's not
17 intent to, you know, hide. Certainly, Your Honor, he
18 would be entitled to introduce evidence of who set up
19 SVA. We're not objecting to that, Your Honor, but what
20 we're saying is evidence that there are these
21 expenditures out of SVA, especially in the context of
22 the disclosures he made. Because the fact that he made
23 those disclosures in September, and nobody freaked out,
24 Your Honor, the disclosures he made in September are --
25 when you look at the Statement of Financial Affairs and

1 the entities listed, the disclosure in September is the
2 equivalent and more, and there was no -- what that
3 demonstrates -- Your Honor, fundamentally here it
4 demonstrates -- and I keep saying it's a Chapter 11 --
5 this isn't what this -- we're trying a case about a
6 bankruptcy -- a narrative in this bankruptcy that didn't
7 exist. These creditors knew that the way they were
8 going to get paid is exactly what Mr. Diehl described,
9 he had to go out and do some deals. And as he told
10 Mr. Tajada taking this exam, he was doing some
11 consulting to keep himself afloat until he could go out
12 and do these deals, and he was going to do the deals
13 through SVA. That was the bankruptcy. The bankruptcy,
14 this fictional bankruptcy that Mr. Hirata described
15 where the creditors were pouring over every single one
16 of his bank statements to find out, you know, did he
17 spend too much money on a magazine subscription, because
18 if he did that could have come to us. That's not this
19 bankruptcy. It never was this bankruptcy.

20 THE COURT: Let me ask you a question.

21 MR. WASHBURN: Sure.

22 THE COURT: One of the elements is the
23 intent element, as I understand it, it is the intent to
24 defraud. So explain how you understand it, what that
25 means.

1 MR. WASHBURN: Your Honor, I'm going to --
2 first I'll start just by reading it out of the footnote
3 number 1 from the government's motion, The defendant
4 made the declaration fraudulently. Okay. That's the
5 element that I think when they talk about intent to
6 defraud that they have to establish. And then when they
7 talk about, To act with fraudulent intent means to act
8 knowingly with the specific intent to deceive,
9 ordinarily for the purpose either to cause financial
10 loss or loss of property or other financial gain, either
11 to oneself or to the detriment of a third party.

12 THE COURT: So they're talking about the
13 trustee and essentially the creditors.

14 MR. WASHBURN: That's correct, I assume as
15 far as third party.

16 But, again, the intent, they have to prove
17 that he made that declaration fraudulently. And the
18 government, when we talk about fraudulent intent,
19 Mr. Hirata up here talked quite extensively about their
20 theory of the subterfuge. That's not this. They have
21 to prove -- and it's the only intent they have to prove.
22 So they can't broaden their intent obligation and say,
23 no, no, no, we have to prove this really broad intent,
24 and so let in the kitchen sink. They have to prove that
25 the defendant made the declaration, that is, the

1 declaration under the Statement of Financial Affairs
2 question 18 where he listed a whole bunch of entities,
3 but not SVA, that he made that omission of SVA
4 fraudulently, that's all they have to prove. That's the
5 only intent they have to prove. Their intent -- I'm not
6 saying it's a light burden. I'll be arguing it's a
7 heavy burden, but it's a narrow burden as to that
8 statement. It's not as to, you know, when he set up SVA
9 he was intending to defraud. They don't have to prove
10 that. When he filed a monthly operating report in
11 October or November of 2012 he intended to defraud,
12 don't have to prove that. And so we were looking at
13 404(b) and other acts and are those relevant to the
14 intent. The intent we're talking about is this narrow
15 intent.

16 Your Honor, if I may, Mr. Hirata described
17 something in the 2004 exam that I think is worthwhile,
18 and it's because it's sort of the core of I guess his
19 theory, which is, had they known that he was managing
20 it, they would have asked a bunch of different
21 questions. And so let me read, and this is on page 79,
22 You know, we're working on several projects right now --
23 and actually let's go back to 78. Okay. Okay. Skyline
24 Venture right now, according to the monthly operating
25 reports, will be making payments to you.

1 That's correct.

2 What are those for?

3 Consulting work.

4 What does that mean?

5 Working on a bunch of projects. I told you
6 it takes a couple of years. Just summarizing here. And
7 we're trying to find consulting work to keep us afloat.

8 When you say consulting, do you mean the
9 same services that you -- listen to the language they're
10 using -- that you were providing through your businesses
11 before you stopped working through Wasatch Pacific? So
12 they're saying, what is Skyline Ventures doing?

13 He says, Well, we're doing some consulting.

14 And they say, When you say consulting, you
15 mean the same services you were providing through
16 Wasatch Pacific?

17 Yes.

18 Is there -- could there be confusion here
19 about the -- the item Mr. Hirata talks about? Yes. I
20 guess when you say providing, I always did this stuff,
21 did it for myself. I'm actually doing some consulting
22 for people in their own projects, and they're paying me
23 to do it. Mr. Diehl isn't saying, hey, Skyline Ventures
24 Associates is doing consulting and, you know, I as a
25 consultant with Skyline Ventures am doing it. No. I'm

1 doing consulting and they're paying me to do it.

2 Who are you doing that for?

3 And then he describes whom they did it for.

4 And he says it's for the development in Draper.

5 And they pay it to Skyline Ventures?

6 Yes.

7 So what they know is when Mr. Diehl's out
8 there doing consulting in the same work that he did with
9 his other business before he stopped working through
10 Wasatch Pacific, he's doing it through Skyline and they
11 pay Skyline. They know that. The thing that Mr. Hirata
12 said was, well, if they had known that he was the one
13 operating it, they would have asked about the payments
14 he was making to himself. What don't they know?

15 THE COURT: The question is is whether the
16 jury should hear that.

17 MR. WASHBURN: Well, Your Honor, whether
18 they should hear this testimony, I agree they should.
19 That's not what we're seeking to exclude. What we're
20 seeking to exclude is evidence of personal expenditures
21 going out from Skyline Ventures Associates, because I
22 don't think -- I don't think those personal expenditures
23 and the American Express bills and all of that evidence
24 doesn't tell us anything at all, especially, Your Honor,
25 where we're sitting there in November, Skyline Ventures

1 Associates has been disclosed more than it would have
2 been under the SOFA.

3 THE COURT: Let me frame the issue as I'm
4 understanding it. I think the government's argument is
5 that Mr. Diehl failed to disclose in the Statement of
6 Financial Affairs the existence of SVA because that
7 advanced his ability to be able to take in money in SVA,
8 use funds for personal expenditures paid out of SVA that
9 otherwise, if they had come to him in his own personal
10 account, would have been disclosed, controlled, argued
11 about in the bankruptcy court, and that is therefore
12 relevant to the question of whether he had an intent to
13 defraud when he failed to disclose SVA. I think that's
14 the government's argument.

15 MR. WASHBURN: I think you've articulated it
16 as well. Although I think they argued it --

17 THE COURT: The question is is why is it not
18 relevant to what his intent was to show that he was in
19 fact using personal expenditures out of SVA?

20 MR. WASHBURN: Because, Your Honor, look at
21 Terry Diehl right after the 2004 exam, okay? And what
22 we have there is there has been way more -- again, let's
23 focus on what's required if he files -- if he listed on
24 the Statement of Financial Affairs. If he lists SVA on
25 the Statement of Financial Affairs, all he has to do is

1 file periodic monthly operating reports. Now, certainly
2 the creditors would know he was affiliated with it. So
3 let's look at what happens the day after the 2004 exam.
4 What do the creditors know? They know he's affiliated
5 with it because of that 2004 stipulated order. They
6 know, if they care to, everything in this transcript.
7 They know they have the right to get those bank
8 statements. I want to be clear, Your Honor, the e-mail
9 showed that Mr. Anderson is offering the bank statements
10 on October 2nd. I think the evidence is going to show
11 that the response never came back from the creditors
12 right then, and there's some back and forth. And what
13 finally happens is the Creditors Committee in their
14 billings and in some e-mails there's evidence that they
15 looked at bank statements on -- not until January. So I
16 just want to be clear there.

17 The point from our perspective is if we're
18 looking at Mr. Diehl's intent to defraud, there he is
19 saying you can have it, come and look at it if you want.
20 Then we ask ourselves, all right --

21 THE COURT: Here's my question: Is that an
22 issue for the jury, should the jury hear that evidence,
23 or is that so far afield from the intent issue -- the
24 intent element that the jury shouldn't hear it?

25 MR. WASHBURN: I think these statements --

1 the personal expenditures are so far afield, and the
2 reason I think they're so far afield is again if we're
3 sitting there in October and Mr. Diehl having disclosed
4 all that, is making personal expenditures, the notion
5 that when he is making a personal expenditure out of SVA
6 in December of 2012, having disclosed everything we know
7 he disclosed, somehow or another that's relevant to show
8 that he intended to defraud clear back in April when he
9 didn't list Skyline Ventures Associates, Your Honor, it
10 proves the opposite. And I don't want the jury to hear
11 it because I think it's confusing.

12 THE COURT: Let me pose something that's not
13 grounded in the evidence at all, but it tests the theory
14 of the case and my understanding of it. Suppose that
15 the evidence were that Mr. Diehl reported on the monthly
16 operating reports consulting income of \$10,000. Suppose
17 that there was \$100,000 received by SVA that was spent
18 on the personal expenditures, wouldn't that be relevant
19 to his intent?

20 MR. WASHBURN: In certain counts it might
21 be, Your Honor. If this were a concealment case, if it
22 were a scheme case, if it were a failure to disclose
23 \$100,000 case, maybe it would. But in this case, Your
24 Honor, like I said, was he sitting there -- let's put
25 him in November of 2012, and Mr. Diehl is writing a

1 check out of SVA for a personal vacation to Jamaica.
2 I'm making it up, whatever it is. Now, he knows he's
3 disclosed it all in September, SVA, he listed it as a
4 closely-held entity. He was asked about it. His
5 attorneys have said come look at the bank statements
6 whenever you want. And he makes that personal
7 expenditure. How is that relevant in any way whatsoever
8 to what his intent was in April of 2012? If he's making
9 personal expenditures after he's completely disclosed
10 it, how does that show that he hid it so that he could
11 continue making personal expenditures?

12 THE COURT: Here's the issue: That may be a
13 very persuasive argument, but is that argument for the
14 jury to hear, or is it one that is so prejudicial that
15 they may confuse the issue and hold Mr. Diehl -- find
16 Mr. Diehl guilty for reasons that have nothing to do
17 with his true intent? That's the issue.

18 MR. WASHBURN: I think it's both that
19 prejudicial. It's also important to note that it's
20 completely uncharged, and its probative value is
21 really -- is quite slight.

22 And so here when we're talking about 404(b)
23 there's a gatekeeper function where under the cases -- I
24 apologize, I don't have it right in front of me.

25 THE COURT: I understand the cases.

1 MR. WASHBURN: You've got that list of
2 claims, and one of them is is it charged, is it not.
3 And then you go -- eventually we get to 403. And I
4 think where we are here, Your Honor, is that intent,
5 that the probative value of these personal expenditures,
6 giving the full context of what went on to his intent
7 back in April of 2012 when he listed all of the entities
8 that he owned, but not this one that he didn't on the
9 SOFA is so small that when we have a trial, and they
10 start to put on evidence that's going to look like a
11 bankruptcy scheme to defraud case, which this isn't,
12 it's going to be so prejudicial that the jury's going to
13 get confused, and there's a substantial risk.

14 THE COURT: Let me ask this question: Would
15 it make a difference in your argument if the personal
16 expenditures occurred before the Statement of Financial
17 Affairs as opposed to after the Statement of Financial
18 Affairs? Because the question of intent is the intent
19 at the time he submitted the Statement of Financial
20 Affairs. And to the extent we consider subsequent
21 evidence, it has to be evidence that is sufficient to
22 show that at the time he entered it -- I compare it kind
23 of like to a contract case. You have a contract case
24 and you try to prove what the intent of the parties was
25 when they entered the contract, you can look at the

1 course of dealings to say, you say now that your intent
2 was X but for three years you acted as if it were Y,
3 that evidence is admissible. So we have two segments
4 here. One is the period of time before the Statement of
5 Financial Affairs and whether there were personal
6 expenditures used by Mr. Diehl out of SVA before he
7 signed it. The second one is subsequent events.

8 MR. WASHBURN: And I understand the
9 distinction, Your Honor, because you're saying, look,
10 those ones before, it seems, would give much more of a
11 buildup to, okay, well, what's he thinking --

12 THE COURT: Yes.

13 MR. WASHBURN: -- you know, on that date
14 when he signed it. And I guess what I would say, Your
15 Honor, is our motion, as I've thought about it, has
16 primarily been focused -- it was something that we
17 thought up when we were looking at all these exhibits.
18 The summaries, that all of theirs are, you know,
19 post-filing expenditures. I think those personal
20 expenditures, if you're asking --

21 THE COURT: There is at least, I believe,
22 maybe this is another motion, but I believe there's
23 evidence of personal expenditures before he signed the
24 statement.

25 MR. WASHBURN: There's certainly one of

1 their summaries, I think, that talks about that, Your
2 Honor, now that you mention it. I guess for present
3 purposes, Your Honor, I've been thinking --

4 THE COURT: It may also go to the question
5 of whether he's a managing executive.

6 MR. WASHBURN: The pre-expenses? You know,
7 Your Honor, I think that's fair to say, well, might that
8 demonstrate whether he's a managing executive.
9 Honestly, Your Honor, I feel like I would like to think
10 about that one a little bit because that distinction
11 isn't one that I've considered.

12 THE COURT: The one that immediately comes
13 to mind is the purchase of the Mini Cooper.

14 MR. WASHBURN: Maybe that's a good segue for
15 me to sit down and for Mr. Peters to talk.

16 THE COURT: Let's hear from Mr. Peters.
17 Mr. Peters, you can determine what's most comfortable,
18 whether you just remain there or whether you move up to
19 the podium. And it's supposed to slide down far enough
20 for you.

21 MR. PETERS: I might do a little bit of
22 both, Your Honor. I like to get the some exercise.

23 May it please the court, Your Honor, my
24 argument -- comments this morning are directed to
25 document 86, rather than to the more comprehensive

1 motion that Mr. Washburn has argued. And I want to lay
2 into the record that this motion was prompted by a
3 witness disclosure on October 21st, 2017. Our motion is
4 specifically directed to currently marked Exhibits 12-7,
5 12-8, 12-9, 12-10, 12-11, 12-12, and 12-13. I would
6 note preliminarily that the government has pointed out
7 that we do not in our motion ask to exclude Exhibit
8 12-14. And they're right. That's in a different
9 category of exhibits, Your Honor, because Exhibit 12-14
10 is postpetition. To the extent that dates are useful
11 here and responding to the court's inquiry about
12 prepetition conduct, if you will, versus postpetition
13 conduct, it is significant that the vehicle that the
14 court referred to was purchased on or about
15 December 5th, as near as I can tell. I may be off by a
16 few days, but I'm close I think.

17 THE COURT: As I remember, there were
18 actually two vehicles, there was a Fiat that was
19 purchased on, as I remember, about December 1st, it was
20 traded in in exchange for a Mini Cooper on about
21 December 5th.

22 MR. PETERS: Sounds right to me, Your Honor.

23 THE COURT: I suspect that all of those
24 transactions will be offered by the government.

25 MR. CASTLE: That's correct, Your Honor.

1 MR. PETERS: Yes. I'm just noting for the
2 record that the exhibit the government refers to, number
3 12-14, refers to conduct on or about May 1st, 2012, so
4 it's postpetition and is not currently the subject of my
5 argument to the court.

6 So I saw that in the court's order on the
7 prior motion in limine the court cited to the *Henthorn*
8 case. Probably a useful case to discuss very briefly
9 because it's such a different form of prosecution. Not
10 only is it a homicide case, but the similars involved,
11 allegations of the defendant murdering his late wife, I
12 guess I should say for the record. And so it's all a
13 rifle-shot analysis. It doesn't lay out like this case
14 does as a canvas where there is conduct that today the
15 government is essentially arguing as scheme conduct, but
16 they've charged, as we know, specific acts of fraud. So
17 if we just assume for a moment that this evidence is
18 being offered for a proper purpose under *Henthorn*, I
19 mean I'll just assume that for a moment, but it's hard
20 to reconcile it to the government's prior position here
21 in which, as the court noted in its October 19th order
22 at document 74, the government conceded earlier in this
23 prosecution that it only intends to proffer evidence for
24 three items that were provided in an addendum under
25 seal, item 3, 6, and 9. It's our argument today that

1 the evidence directed to these vehicles would violate
2 the government's agreement, I'm going to call it, or the
3 government's concession in the court's prior order
4 because it would trample on items 4 and 14 in the
5 addendum. But I'm not sure that that's dispositive of
6 the problem here. Additionally, the evidence must be
7 relevant under *Henthorn* and ultimately *Huddleston*.

8 So what do we know from what appears to be
9 undisputed evidence on the vehicle transaction? We know
10 that some form of cash was paid to purchase the vehicle,
11 in addition to the value of the trade on the earlier
12 vehicle. We know that it was titled to SVA. I would
13 represent to the court that the funds cannot be traced
14 and will not be traced to any SVA account. Mr. Hirata
15 mentioned that an SVA account was opened. That's true.
16 I believe it was opened in late 2011. But there is no
17 evidence that that account which was opened with a check
18 written by Kim Monroe, who the court has heard about, in
19 the amount of \$1,000, there is no evidence that that was
20 the source of payment for this vehicle.

21 So, ultimately, we know that about four
22 months before the petition was filed on March 30, 2012,
23 Mr. Diehl apparently facilitated the purchase of a
24 vehicle that was titled to SVA, all of this in relation,
25 I might add, to his individual bankruptcy. I mean I

1 think distinctions make a difference sometimes. And as
2 the court is aware, bankruptcy is a legal fiction. This
3 was an individual Chapter 11 reorganization, and SVA was
4 not the debtor. And it is not alleged, as the court has
5 pointed out, that SVA was the alterego of the debtor in
6 bankruptcy. It isn't even alleged in the Indictment
7 that SVA was an affiliate of the debtor. So --

8 THE COURT: It seems to me -- I don't want
9 to cut off your argument, but it seems to me that if
10 this evidence is relevant at all, it is relevant to the
11 question as to whether or not Mr. Diehl was the managing
12 executive of SVA.

13 MR. PETERS: That's exactly right, Your
14 Honor. That's what it comes down to.

15 THE COURT: So address if he was executing
16 these transactions on behalf of SVA, is that
17 probative -- is that some evidence that would advance
18 the proposition that he was the managing executive?

19 MR. PETERS: And I would say that on a
20 prepetition analysis it is not. This case, this
21 bankruptcy case that we're here about was commenced on
22 March 30th, four months after these vehicles were
23 acquired. They don't tie to anything about the business
24 of SVA. There are few evidentiary arguments I would
25 like to turn to in a moment that I think make it dubious

1 whether the evidence can possibly suggest by -- at least
2 by a preponderance of the evidence in admitting it or
3 not. I'm not sure that a preponderance of the evidence
4 suggests that it would be admissible as evidence that
5 the court is alluding to as evidence that Mr. Diehl was
6 a managing executive of SVA.

7 But what I can tell the court as well is
8 that there won't be many examples of this postpetition.
9 In other words, it is not the case, categorically not
10 the case, that Mr. Diehl continued to buy vehicles and
11 title them to SVA after the date of the petition. I
12 don't expect the evidence will show so. And it is not
13 the case further -- let's just turn to what I think the
14 court is alluding to, if I may. May I hand up two
15 exhibits? I think that's all I'm going to need.

16 THE COURT: Sure.

17 MR. PETERS: May I have a moment, Your
18 Honor?

19 THE COURT: You may.

20 (Mr. Peters handing exhibits to Mr. Hirata.)

21 MR. PETERS: Your Honor, what's before the
22 court are two exhibits previously marked by the
23 government. It consists of Government's Exhibit 12-8 in
24 what I'll call its unabridged form for the moment
25 because there are several versions of Government's

1 Exhibit 12-8 now based on the government's latest
2 filings. And then the other exhibit I've handed up is
3 Proposed Exhibit Government 12-10. So that's 12-8 and
4 12-10.

5 Now, beginning with 12-8, it's my
6 understanding that this purports to be ultimately a
7 36-page compilation of some form of mailing containing
8 the contents of the Mini Cooper transaction. It appears
9 to be a mailing to Mr. Diehl. But if you back into the
10 exhibit, Your Honor, I think by seven pages you'll see
11 what is entitled a Resolution of Board of Directors of
12 Skyline Ventures Associates, Inc., but it's not signed,
13 the difference being it's not signed. So it appears --
14 and we've attempted to contact the witnesses who were
15 disclosed on Saturday and I think again one of them on
16 Monday, and thus far unsuccessful. But it appears that
17 the dealership prepared the resolution that, at least in
18 Exhibit 12-8, is unsigned. And understanding what it
19 represents, those representations include a
20 representation that the corporate seal of the
21 corporation would be hereinto affixed. And you'll note
22 that in Exhibit 12-10 there is no such seal. There's a
23 signature, but there's no seal.

24 I would also ask the court to note that --
25 where is this exactly? Yes. And that the above is a

1 true and correct copy of a resolution duly adopted at a
2 meeting of the board of directors thereof convened and
3 held in accordance with the law and bylaws of the said
4 corporation. In other words, that the corporation and
5 its board of directors had made a decision to purchase
6 this vehicle, and there is no such resolution in the
7 government's evidence.

8 And further, as we have tendered in our
9 final proposed jury instruction number 7, under Utah law
10 all corporate power shall be exercised by or under the
11 authority of, and the business and affairs of the
12 corporation managed under the direction of, its board of
13 directors. I believe I'm referring to Utah Code
14 Annotated 16-10a-801. I make these points because it is
15 unclear that the document marked as Exhibit 12-10 could
16 be sufficiently authenticated under Rule 9014, or under
17 any category of the non-hearsay exception 801 should it
18 be authenticated.

19 So this is a long way of saying, Your Honor,
20 on the point that you raise as to the managing
21 executive, I'm not sure the court could find by a
22 preponderance of the evidence that Exhibit 12-10 in a
23 signed version should come before the jury as admissible
24 evidence. And I make that point independently.

25 THE COURT: Why wouldn't it come before the

1 jury as an admission of the defendant?

2 MR. PETERS: Well, only if it can be
3 established that it's authentic.

4 THE COURT: Meaning his signature.

5 MR. PETERS: Yes. And I will also add, Your
6 Honor, that --

7 THE COURT: Obviously that has to be
8 established.

9 MR. PETERS: Right. And if so, I
10 anticipate, the government hasn't said so, they would
11 offer this through the testimony of Kim Monroe, the
12 assistant that Mr. Washburn referred to. We believe
13 that this document was taken by Ms. Monroe in some form,
14 whether it was executed or not, when her employment
15 ended, which was well before the Indictment in this
16 case. And I would also note that Mr. Diehl had a stamp
17 that she routinely used to sign his signature. So there
18 are a number of questions about the document
19 independently of the *Henthorn* analysis.

20 The government filed a response to our
21 motion last night at approximately 5:00 p.m. I have a
22 few hopefully helpful comments about that in lieu of a
23 reply. At page 4 of the response the government
24 indicates that Mr. Dooley, who was apparently the car
25 salesman, required the defendant to provide a corporate

1 resolution from SVA showing that he had the authority to
2 act on SVA's behalf before the car could be titled.

3 Your Honor, we're not sure, again, that
4 anybody on our side prepared this resolution. We think
5 it may have been prepared by the car dealer, and that
6 the car dealer required this to go forward with the
7 transaction. So at the time of this hearing this
8 morning we object to the introduction of the evidence,
9 even if you find it would satisfy Rule 404(b), as
10 evidence of intent. I can tell you that you won't see
11 these resolutions in the evidence that I've been
12 provided at any date after December 5, 2011, they
13 won't -- they are not something that you'll see
14 postpetition, you won't see them in any other fashion
15 prepetition.

16 And so I think that focuses us on the 403
17 analysis because that's one of the tests we have to go
18 through under *Henthorn*. And I don't want to belabor the
19 point, but I think the evidence that is before the court
20 and the exhibits that we have identified for exclusion
21 clearly raise 403 concerns that outweigh the probative
22 value of this isolated resolution if it can be
23 authenticated and properly admitted at trial. The
24 content of it clearly does not bear on this bankruptcy.
25 I would say I believe that the vehicle was sold sometime

1 postpetition and the proceeds were deposited into an SVA
2 account. But there's not going to be any evidence in
3 this case that SVA was in the business of buying or
4 selling vehicles. SVA was in the business of developing
5 land and related ancillary services.

6 So I believe, Your Honor, that this is being
7 proffered before the jury to prejudice the defendant. I
8 believe it would prejudice the defendant significantly
9 and that the prejudice would be substantial and would be
10 far greater than any probative value and would warrant
11 exclusion under 403. It's a side show to this
12 bankruptcy case, this particular transaction is a side
13 show. It doesn't come from any evidence I've reviewed
14 from advice of counsel provided to Mr. Diehl, it doesn't
15 come from any elaborate planning that I can deduce to
16 engage in a scheme.

17 And as Mr. Washburn has pointed out quite
18 correctly, there is no scheme charged here. If this
19 were a scheme case that were alleged to have begun in
20 December of 2011 with this event, for example, it might
21 be different. But it's a rifle-shot Indictment now with
22 all of these counts having been abandoned. There's just
23 the one bankruptcy fraud count. It comes much later on
24 April 12th of 2012. It is not, in my view, proximate in
25 time to the transaction that I'm discussing, we'll call

1 it the vehicle transaction.

2 The government cites several cases, all
3 Tenth Circuit, at page 8 of their response yesterday
4 afternoon for the proposition, among others, and you
5 heard this from Mr. Washburn, that somehow this vehicle
6 purchase is inextricably intertwined with what is
7 charged. So let's figure out what would really have to
8 happen for that to be an accurate statement. First of
9 all, and this is a distinction with a difference that
10 will pervade I believe the entire legal analysis of this
11 Indictment, as Mr. Washburn has pointed out, this is a
12 reorganization in bankruptcy. This was not a bankruptcy
13 filed to discharge debt, to liquidate debt. And so the
14 purchase of this vehicle might be far more relevant if
15 it was an asset that could have been used to pay
16 creditors in liquidation, which it was not. So I don't
17 countenance the idea that the government is advocating
18 that somehow the purchase of this vehicle four months
19 before bankruptcy was, quote, inextricably intertwined
20 to the false statement that is alleged on the Statement
21 of Financial Affairs. I likewise don't countenance that
22 this evidence, as the government puts it, is part and
23 parcel of that proof because it's not proximate in time
24 and it's obviously not the motivation for the
25 bankruptcy. Mr. Diehl did not seek bankruptcy

1 protection to hide this transaction, to hide this asset,
2 to conceal this asset from his creditors.

3 The bankruptcy involved, as I understand it,
4 about \$37 million dollars of debt. It's not what the
5 case was about. Mr. Diehl went into bankruptcy
6 individually to reorganize. And as the court has heard
7 in prior proceedings, has repaid a substantial portion
8 of the debt.

9 So it rings out to me, Judge, that this
10 evidence would be substantially outweighed by the danger
11 of unfair prejudice and the court should very carefully
12 consider whether it should come before the jury.

13 Now, I don't -- I would like to hear what
14 the government will say, but at page 9 of 14, the
15 government says that the evidence in question here, the
16 vehicle transaction, proves the defendant's plan,
17 preparation, knowledge, and intent to falsely omit SVA
18 from the Statement of Financial Affairs.

19 Not to be repetitive, I would ask how. To
20 me it proves the defendant's intent to seek an
21 arrangement with someone for whom he bought a car that
22 was titled to this business and doesn't tie in any
23 significant way to his intentions in bankruptcy.

24 As I've noted, there are no other examples
25 of Mr. Diehl representing himself to be an officer or

1 director of this entity in any of the evidence. There
2 were 600 exhibits. This is only one.

3 At page 11 of the response the government
4 argues that this evidence goes to prove the defendant's
5 motive, knowledge, and intent about lying and concealing
6 SVA from his creditors. And on December 5, 2011, I
7 would ask the court what creditors could they possibly
8 be referring to since there was no bankruptcy estate,
9 there was no bankruptcy petition, and none of the legal
10 fiction that attends all of that was in place. So there
11 is no evidence that this vehicle was titled to SVA to
12 keep it out of the reach of someone that Mr. Diehl owed
13 money.

14 The proposed evidence the government
15 contends is relevant under Rule 402 because is highly
16 probative of the defendant's state of mind, I would say
17 that the evidence before the court is highly probative
18 of the defendant's intent to purchase this vehicle
19 trading a Fiat for it and putting down cash. They can't
20 be traced to this estate. The government's not trying
21 to trace it to this estate. And, again, we have a
22 fundamentally different form of bankruptcy at play here,
23 namely a reorganization.

24 Your Honor, I understand that the court has
25 substantial discretion in ruling on this motion. These

1 are my comments. I feel very strongly that this will
2 prejudice our case, this particular piece of evidence
3 that I'm focusing on. And to get a fair trial we ask
4 that it be excluded.

5 Yeah. I guess my final comment about the
6 response would be that the government cites to the *Old*
7 *Chief* case. These felon in possession cases keep coming
8 up all the time in 404(b) analysis, and it's inevitable
9 because there's a proof requirement on the underlying
10 conviction. But to be unfair, according to the United
11 States Supreme Court, the evidence has to have the
12 capacity to lure the factfinder into convicting on a
13 ground different from proof specific to the offense
14 charged. And that's what I think we have here. We have
15 a fairly nefarious piece of evidence. It doesn't tie
16 well to this bankruptcy. It is only an isolated
17 instance of unique form of resolution, like the ones
18 before the court in this argument as Exhibits 12-8 and
19 12-10. And I ask the court to exclude the evidence.

20 I would like to reserve time for reply, if
21 the court will hear it, although I know that the hearing
22 has been going for some time. Thank you, Your Honor.

23 THE COURT: Thank you.

24 Mr. Castle, I hate to do this, but I have an
25 obligation before the judge's meeting on an item that I

1 am primarily responsible for, so I'm going to -- we're
2 going to have to take a break. I know you're all really
3 busy getting ready for trial, but if we came back at
4 1:30, would that inconvenience everybody too much?

5 MR. CASTLE: Your Honor, that will work for
6 the United States.

7 MR. PETERS: Fine for us.

8 THE COURT: I'll hear your argument at 1:30,
9 and hopefully by that point, after further argument, be
10 in a position to rule on the motions. We will be in
11 recess until 1:30.

12 (Recess.)

13 THE COURT: We are back in session in United
14 States v. Diehl. Counsel are present, Mr. Diehl is
15 present.

16 Mr. Castle.

17 MR. CASTLE: Thank you, Your Honor.

18 Your Honor, I thought maybe before I get
19 into the substance of my argument that we would go over
20 the exhibits. As I indicated in my response as to
21 Exhibit 12-8, I reviewed that exhibit yesterday and
22 realized there are probably documents in there that
23 under no circumstances would we admit those, and so what
24 I did is I went ahead and attempted to re-mark the
25 exhibits that I believe we will use. There's still

1 12-8. And, Your Honor, I should have mentioned with
2 respect to 12-8 the exhibit that was given to the court
3 actually was missing a cover page on that document. And
4 I have that for the court, if I could approach. Not
5 that this is necessarily a huge issue, it's not, I just
6 want to let the court know that that was -- that
7 Exhibit 12-8 was an exhibit that was obtained when a
8 search warrant was executed on Mr. Diehl's home, and
9 apparently this is a file that was being maintained by
10 Kim Iba. And you can see on the front there it says
11 Liz. As I understand it, Your Honor, that refers to Liz
12 Carillo, the woman for whom Mr. Diehl purchased the Fiat
13 and then the Mini Cooper. So I just wanted to clarify
14 that.

15 I think that at least -- I think it's
16 generally our office's practice, Your Honor, is that we
17 overidentify exhibits and mark them for the reason that
18 it's hard to anticipate what's going to happen at trial,
19 and we might need to use an exhibit that we didn't think
20 we were going to use. We certainly don't want to be
21 accused of not identifying that particular exhibit as an
22 exhibit.

23 I've also handed, Your Honor, to Mr. Peters
24 what I will call a reconstituted Exhibit 12B which
25 involves 12A -- excuse me, 12-8, 12-8B, 12-8C, and

1 12-8D. And I have those for the court. I know I sent
2 copies over. I just wanted, in the event they are not
3 handy, there they are.

4 Your Honor, originally the motion of
5 Mr. Peters, at least the way I read it, was a motion to
6 enforce the court's prior in limine order. And as we've
7 proceeded here, and I think as I articulated in my
8 response, that the evidence that we propose to use
9 that's identified in these exhibits that we've been
10 talking about don't violate your previous in lim order.
11 I mean that was the caption at least on this motion.
12 It's our position that it doesn't. We're talking about
13 a different kind of evidence. In fact, my response
14 would be, based on your ruling, that we had to show
15 personal expenses, that we in fact are following that
16 order, and calling these witnesses, Ms. Carillo in
17 particular, to talk about personal expenses that
18 Mr. Diehl expended on her benefit and coupled with that
19 and we're going to bring in other evidence to show that
20 that money was taken from Skyline Ventures Associates'
21 account postpetition, or after the filing.

22 THE COURT: Let me follow up on that because
23 Mr. Peters represented that they were unable to trace
24 the funds to an SVA account. Do you have evidence to
25 the contrary?

1 MR. CASTLE: Well, let me tell you -- I'm
2 glad that came up, Your Honor, because I've thought
3 about that. So this is what we do have: The Fiat was
4 purchased in the name of SVA, an SVA asset. Mr. Diehl
5 took an SVA asset and he traded it in.

6 THE COURT: Do we know where the money came
7 from to buy the Fiat?

8 MR. CASTLE: Your Honor, we believe, though
9 not a hundred percent sure, that the money came from
10 Mr. Diehl's withdrawal of \$95,000 from a casino account.
11 And let me just say this: Your Honor, when the Fiat was
12 purchased it was purchased with cash, \$40,000, \$100
13 bills. And when the Mini Cooper was purchased, as I've
14 indicated in my response, 17,000 plus dollars in cash
15 was paid, once again in \$100 bills. So it's our
16 position, Your Honor, when it comes to that issue that
17 Mr. Diehl -- regardless of where the cash came from, the
18 Fiat was titled in the name of -- or purchased in the
19 name of SVA. It became an SVA asset at that point.
20 Then when he took that Fiat, which was as good as money,
21 money that belonged to SVA, and purchased the Mini
22 Cooper, that demonstrates his control over assets of
23 SVA. You can call it money. It had a numerical value.
24 And the Mini Cooper dealership gave Mr. Diehl what it
25 thought was the appropriate value on the trade-in. So

1 that's our position when it comes to the use of SVA
2 assets for personal use.

3 Your Honor, but the evidence also
4 demonstrates what has been kind of the center of today's
5 hearing, and that is, evidence to show that Mr. Diehl
6 knowingly and fraudulently failed to disclose SVA in
7 response to question 18. Well, Your Honor, I went back
8 to my office -- we've been talking a lot about question
9 18 but we haven't spent the time just to read what it
10 asks, but it's important. Your Honor, I have that
11 exhibit here, Exhibit 2-5. I provided that to defense
12 counsel, and I've tabbed it, Your Honor, just for
13 convenience purposes only. Because what's interesting
14 about question 18, Your Honor, it asks, if you go to 18
15 subparagraph a., it says, If the debtor is an
16 individual, list the names, addresses, taxpayer
17 identification numbers, nature of the businesses, and
18 the beginning and ending dates of all businesses in
19 which the debtor was an officer, director, partner, or
20 managing executive of a corporation, partner in a
21 partnership, sole partnership, or self-employed in a
22 trade, profession, or other activity either full or part
23 time within six years immediately preceding the
24 commencement of this case. So what that question
25 requires, Your Honor, is for a debtor to disclose the

1 fact that he or she has been, among other things, a
2 managing executive of a corporation six years prior to
3 the filing of bankruptcy. So with Mr. Diehl, Your
4 Honor, the evidence that we're talking about is well
5 within that six-year period. It is within about four,
6 four and-a-half months.

7 But, Your Honor, it's the government's
8 position that the fraud that Mr. Diehl engaged in, when
9 it came to the filing of the Statement of Financial
10 Affairs, started long before he filed bankruptcy. It
11 started, Your Honor, when he formed SVA on
12 November 22nd, and that followed the formation of SVG,
13 Skyline Venture Group, in October of 2011. And what's
14 interesting about those two, Your Honor, is that
15 Mr. Diehl owned 33 percent of SVG. Each one of his
16 daughters owned 33 percent. Based on that ownership,
17 Your Honor, that's clearly an entity that would have to
18 be disclosed in response to question 18.

19 So what Mr. Diehl did, Your Honor, is he
20 formed another company where on paper he's not an owner,
21 on paper he's not an officer. But in reality, Your
22 Honor, he was nothing less than the managing executive
23 of SVA. And how do we know that, Your Honor? Because
24 within, what, 13 days of forming SVA Mr. Diehl is out
25 buying a Mini Cooper.

1 Your Honor, we have interviewed Mr. John
2 Dooley, and I will talk to him again most certainly, but
3 I will represent to the court that he asked Mr. Diehl
4 for a corporate resolution. The dealership did not put
5 that together. That was Mr. Diehl.

6 And, Your Honor, just to draw this one
7 important point, when you look at Exhibit 12-8, and
8 Mr. Peters talked about this, there's a corporate
9 resolution that's in there that's not signed. But keep
10 in mind that corporate resolution was found at
11 Mr. Diehl's home when the search warrant was executed.
12 The document we want to use is the document that is
13 signed that Desert Mini Cooper of Las Vegas, if I've got
14 that right, that's the one that they received.

15 Your Honor, we understand there might be
16 some authenticity issues arising, and certainly we know
17 well enough that we're going to have to satisfy those
18 before the document is admitted, which we plan on doing.
19 But, Your Honor, that document's critical because it
20 shows the knowledge of Mr. Diehl and the way he viewed
21 his relationship with Skyline Ventures Associates. And
22 despite that, when it came to filing his Statement of
23 Financial Affairs he didn't disclose SVA. And there's
24 another interesting point about that, Your Honor, if you
25 look at question 18 you will see that Mr. Diehl

1 disclosed I think 15 different entities, and the only
2 entity he didn't disclose, the only entity that made any
3 difference is the one he didn't disclose. And, Your
4 Honor, the transaction involving the Fiat and the Mini
5 Cooper are relevant to showing Mr. Diehl's intent to
6 falsify his answer to question 18 on his Statement of
7 Financial Affairs.

8 And let me just make a note here, Your
9 Honor, I think there's some notion out there in the
10 legal world that if a particular allegation is not
11 contained in the Indictment, that that somehow
12 supersedes the concepts of intrinsic evidence and 404(b)
13 evidence. I think that's an over-reading of what is
14 required for the United States to put in the Indictment
15 that's returned by a grand jury.

16 Your Honor, I make this point, and I know
17 that defense counsel talked about this, they talked
18 about, well, the government's using the word concealment
19 in the context of this false declaration. Well, my
20 question would be what else do you call it when you fail
21 to disclose SVA? What's your purpose for not disclosing
22 it? You can call it concealment, you can call it
23 hiding. And when they talk about concealment as a
24 charge, Your Honor, I want to point out that
25 concealment -- well, 152(1) concealment crime requires

1 an extra element of proof that is not required by a
2 false declaration count. And that is, Your Honor, we
3 have to show that the property concealed was property of
4 the estate. We're not saying that SVA was property of
5 Mr. Diehl's estate, just like we're not saying that all
6 the other companies he listed were property of the
7 estate. What's property of the estate is his interest,
8 Your Honor, in those companies, and it's important to
9 list those because creditors want to know if there are
10 assets available in these companies to pay them back.

11 Mr. Peters wanted to make the distinction,
12 Your Honor, between, well, this is a Chapter 11 and
13 somehow it's different. Let me make two comments about
14 this. The Statement of Financial Affairs here, 2-5,
15 Your Honor, this is a document that is used in every
16 Chapter 7, every Chapter 13, every Chapter 11 case.
17 There's not some different standard with a Chapter 11
18 case. In a Chapter 11 case, Your Honor, the debtor's
19 objective is the same as in a 7, and that is to get a
20 discharge of his or her debts. If you were to look at
21 the plan of reorganization that Mr. Diehl confirmed in
22 this case, you would see that very language, Your Honor,
23 that upon confirmation and the effective date of that
24 plan he received a discharge of his debts. So people
25 that file bankruptcy, that's the objective.

1 Just as a footnote, Your Honor, I might
2 mention that when it comes to Chapter 11 cases there was
3 a period of time in my career that I was a bankruptcy
4 attorney, I worked at the U.S. Trustee's Office myself,
5 that there's about a 1 percent chance for Chapter
6 11 cases to be confirmed, and 99 percent of the time
7 they ended up either dismissed or converted into a
8 Chapter 7. I'm not saying that's a real important
9 issue. I'm just trying to make the point that, Your
10 Honor, the requirement of being honest with respect to
11 question 18 it doesn't matter what bankruptcy you file.

12 So, Your Honor, the exhibits that have been
13 identified up to Exhibit 12-14, Your Honor, deals with
14 the transaction involving the Fiat and the Mini Cooper.
15 Yes, we will have witnesses testify and authenticate
16 those documents. Your Honor, that evidence is relevant
17 from our perspective. It's intrinsic, Your Honor, to
18 show the requisite intent that Mr. Diehl had when he
19 failed to disclose SVA on his Statement of Financial
20 Affairs at the time he filed these. And, Your Honor, I
21 appreciated your comment about that, that what we're
22 focusing in on is what was Mr. Diehl's intent at the
23 time he filed his Statement of Financial Affairs, not
24 two years later, not the time the plan was confirmed.
25 That's really not relevant. What's relevant is what was

1 your intent at the time. And the way for us to see that
2 is his behavior before and his behavior after.

3 And I find it interesting, Your Honor, that
4 Mr. Peters did not want to talk about Exhibit 12-14.
5 And you have that, Your Honor, I provided that to you
6 because 12-14 is the bookend to the corporate resolution
7 Exhibit 12-10. Because what's happened, apparently,
8 Ms. Carillo needed some keys, she needed those around
9 May 15th of 2012. And, Your Honor, that date's
10 important, May 15, 2012. Mr. Diehl's 341 meeting was
11 May 8th of 2012. And there on May 15th, according to
12 this attachment to an e-mail that went to a Daniel
13 Reeves, Mr. Diehl, appears to be a copy of a business
14 card. It says, Skyline Ventures Associates, Inc., Terry
15 C. Diehl, CEO-Consultant. So we have Mr. Diehl, he
16 called himself whatever he wants, Your Honor. At some
17 point in the 1st of December he's identifying himself as
18 the president of Skyline Venture Associates. He has the
19 authority to buy the Mini Cooper. And then when he's
20 asking for these new keys for Ms. Carillo he identifies
21 himself as the CEO. Well, he can do that, Your Honor,
22 because he's the managing executive of Skyline Ventures
23 Associates, and he does this right after his 341
24 meeting. And at that 341 meeting he testified under
25 oath that the statements and schedules were true and

1 correct, Your Honor. Seven days later he's out
2 representing to the public that he, no, is the CEO.

3 And not to reiterate what Mr. Hirata said,
4 Your Honor, but Mr. Diehl never properly disclosed his
5 relationship to SVA. And what's interesting about
6 bankruptcy, Your Honor, if you make a mistake on your
7 Statement of Financial Affairs or your Schedules of
8 Assets and Liabilities you could always go back and
9 amend those. Did Mr. Diehl do that? No, he didn't,
10 neither did his attorney. And I'll be curious to hear
11 from Jimmy Anderson when he takes the stand, Your Honor,
12 to talk about the stipulation and order related to the
13 2004 where it indicates -- or that Mr. Diehl was
14 stipulating that that's a closely-held entity that he
15 has an interest in or has a business relationship in.
16 My question for Mr. Anderson is going to be, well, with
17 that knowledge, Mr. Anderson, why didn't you go back and
18 amend these Statement of Financial Affairs? That's a
19 critical question because debtor's counsel has an
20 ongoing duty to make sure the documents filed with the
21 bankruptcy court are true and accurate.

22 So, Your Honor, based on the evidence
23 confined to the 12-8 exhibits I've talked about, 12-9,
24 12-10, 11, 12, 13, 14, Your Honor, it's our position
25 that this evidence is relevant, it goes to the issue of

1 Mr. Diehl's intent, whether we call it intrinsic or
2 404(b). If we call it 404(b), it certainly fits in the
3 category of plan, knowledge, and motive. And based on
4 that, Your Honor, we would ask that you deny the motion
5 that's been filed to enforce your in limine order.

6 THE COURT: Thank you.

7 Mr. Peters, do you wish to respond?

8 MR. PETERS: Very briefly. Without
9 restating any argument and having attempted to
10 countenance the court's questions, as well as
11 Mr. Castle's argument, it's our position that the court
12 should enter an order in limine excluding the following
13 marked Government Exhibits 12-6, which was not a subject
14 of the motion, 12-7, 12-9, 12-11, 12-12, and 12-13. We
15 stand by the proposition that as to Exhibits 12-10
16 and -- yes, 12-10, Your Honor, that you inquired about
17 in my argument, that 403 considerations warrant
18 excluding that exhibit for the reasons stated on the
19 record today. However, if the court is inclined to
20 permit the use of that exhibit, then we would ask that
21 outside of the hearing of the jury we be allowed to
22 inquire of the witness John Dooley as to the
23 authenticity of that exhibit, which we believe would
24 avoid further prejudice to Mr. Diehl in the event that
25 you do permit any of this evidence at trial. Thank you,

1 Your Honor.

2 THE COURT: Thank you.

3 Let me see if I can match your list with the
4 list that Mr. Castle has just given me. I don't know
5 that I have 12-6.

6 MR. PETERS: 12-6 was not tendered by any
7 party in this motion practice, Your Honor. For the
8 record, I'm told that it purports to be a September 14,
9 2011, e-mail from Mr. Diehl to the same witness who's
10 under discussion in this motion.

11 THE COURT: Let me ask --

12 MR. CASTLE: Your Honor, we don't -- there's
13 a little more to Exhibit 12-6 that would explain why
14 defense doesn't want that admitted. We don't plan on
15 offering that exhibit. And I indicated that, Your
16 Honor, in my response.

17 THE COURT: I will -- with respect to 12-6,
18 it will be -- assuming the government is not intending
19 to offer it, the court grants the motion.

20 What about 12-7?

21 MR. CASTLE: What was 12-7? Was 12-7
22 included, Your Honor, in --

23 THE COURT: What I have --

24 MR. CASTLE: Your Honor, I'm sorry, but that
25 was not an exhibit listed, so I don't have that in front

1 of me to be able to comment. I focused on 12-8, 9, 10,
2 11, 12 and 13, and then my 14.

3 THE COURT: That's all I have in front of
4 me.

5 MR. CASTLE: Yes. So I would ask that you
6 not make a ruling as to 12-7 being that I can't remember
7 what it is, so ...

8 THE CLERK: E-mail from -- (not able to hear
9 the clerk.)

10 MR. CASTLE: Oh, okay. Then that would
11 include 12-7, Your Honor. That's fine.

12 THE COURT: That would be granted as to
13 12-7.

14 What's 12-9, Mr. Peters?

15 MR. PETERS: It purports per the exhibit
16 list provided by the government to be a Nevada DMV
17 record for a 2012 Mini Cooper.

18 MR. CASTLE: Well, Your Honor, that's
19 important because it demonstrates a couple of things.
20 First of all, the car was purchased for Ms. Carillo's
21 personal use. It was titled in Nevada, she drove the
22 car in Nevada. It was actually never used for business
23 purposes. It was used for her personal use, so that's
24 important for us to prove where that car was titled,
25 where it stayed, and who drove that car, with

1 Mr. Diehl's permission, I might add.

2 THE COURT: All of these rulings are subject
3 to authentication and foundation, but on the grounds
4 moved, the motion is denied as to 12-9.

5 What is 12-11?

6 MR. PETERS: It purports to be the Retail
7 Purchase Agreement for a 2012 Fiat 500 Sport.

8 MR. CASTLE: No, Your Honor. 12-11, I
9 believe, is the purchase for the Fiat -- or for the Mini
10 Cooper.

11 MR. PETERS: Well, it's possible. I don't
12 have a current exhibit list. But in the one provided by
13 the government that's the description of 12-11.

14 THE COURT: Would you scroll that down?

15 MR. PETERS: I can bring it up on the screen
16 here if you give me a moment, Your Honor.

17 THE COURT: The document I have appears to
18 be a Retail Purchase Agreement from Desert Mini of Las
19 Vegas. The customer is identified as Skyline Ventures
20 Associates for a Mini Cooper. And it's got the price.

21 MR. CASTLE: Yes, Your Honor, this involves
22 the purchase of the Mini Cooper.

23 THE COURT: The motion will be denied as to
24 that exhibit.

25 With respect to 12-12, make sure I've got

1 the right one, 12-12 is the Agreement to Provide
2 Insurance. It appears to be signed. Again, subject to
3 authentication and foundation, on the grounds moved
4 upon, the motion is denied as to the Agreement to
5 Provide Insurance.

6 And with respect to 12-13, that appears to
7 be the Division of Motor Vehicles information showing
8 the lienholder.

9 MR. CASTLE: Your Honor, I believe that that
10 particular document reflects the selling of the Mini
11 Cooper to another party at a later date. Am I correct
12 about that? I think that's what that document is. I'm
13 sorry, I thought I had a copy of that. And if it is in
14 fact that document, we don't plan on introducing that
15 in.

16 THE COURT: It has attached to it a vehicle
17 application for a Utah title.

18 MR. CASTLE: Your Honor, that's not one we
19 intend to offer.

20 THE COURT: That one the motion is granted.
21 With respect to 12-10, let me get the
22 document in front of me, this is the Resolution of the
23 Board of Directors that does have a signature on it.

24 MR. CASTLE: Yes, Your Honor.

25 THE COURT: And the court denies the motion,

1 but provides the following explanation and limitation:
2 To the extent that there is foundation laid and the
3 signature authenticated and delivery is proved, in other
4 words, that it existed someplace other than just in
5 Mr. Diehl's file, it will be received in evidence. I
6 think it may be also helpful on this motion to address
7 the issue of personal use. To the extent that --
8 Ms. Carillo -- is that her name?

9 MR. CASTLE: Carillo, yes.

10 THE COURT: -- is called to testify, I think
11 it would be permissible to ask her if in fact she used
12 the car, it would be permissible to ask her if in fact
13 she had any official responsibilities as an employee,
14 officer, or other person on behalf of SVA. Beyond the
15 fact that her involvement in the case -- beyond that
16 what -- the nature of her personal relationship with
17 Mr. Diehl, if any, was I think is irrelevant.

18 MR. CASTLE: Point of clarification, Your
19 Honor, she will also provide testimony about Mr. Diehl
20 buying personal items for her postpetition. We recall
21 your ruling on that, Your Honor, so we would bring her
22 to testify about -- I'm just going to call them gifts,
23 Your Honor, for lack of a better word, that Mr. Diehl
24 purchased for her. And we will tie that up in terms of
25 coming out of the SVA account after Mr. Diehl filed

1 bankruptcy. And I am hopeful she can --

2 THE COURT: If in fact that the government
3 is able to establish evidence that SVA funds out of an
4 SVA account were used for personal items for her, that
5 would be admissible.

6 MR. CASTLE: Thank you, Your Honor.

7 THE COURT: Let me also just make one
8 further observation that may be helpful to the parties.
9 With respect to the funds that were used to purchase the
10 vehicles, it is going to be important to establish that
11 the funds came from SVA. The fact that title was taken
12 in the name of SVA and Mr. Diehl tended to control that
13 would go to the fact as to whether or not he was a
14 managing executive of the company. To go beyond to show
15 that those funds in fact were SVA funds as opposed to
16 his own personal funds, you're going to have to complete
17 the link that they were in fact SVA funds and he was
18 using an SVA account in some way in order to tie that
19 together. Any questions about that?

20 MR. PETERS: Yes, Your Honor. Are you
21 saying that foundation would need to be laid before the
22 exhibit evidence could be admitted as to these vehicles,
23 is that what the court is saying?

24 THE COURT: Well, to the extent --
25 foundation will have to be laid before the exhibits are

1 admitted and shown to the jury. As to the fact as to
2 whether or not he was the managing executive, I'm not
3 going to require that be out of the presence of the
4 jury. To the extent that you're claiming that that was
5 the use of SVA funds for his personal use, then you're
6 going to have to establish that outside of the presence
7 of the jury so that there is a -- right now I don't have
8 sufficient evidence in front of me to make a
9 determination as to whether they were SVA funds or not
10 SVA funds, and I will make a preliminary decision about
11 that before we submit it to the jury. Does that clarify
12 that issue?

13 MR. CASTLE: It does, Your Honor. If I
14 could just ask one question. That doesn't preclude us,
15 though, from eliciting testimony from Ms. Carillo that
16 she used the car for her personal use, that she did not
17 have a business relationship with SVA.

18 THE COURT: No, it does not preclude that.

19 MR. CASTLE: Thank you, Your Honor.

20 THE COURT: I believe that's permissible.

21 Any -- let's go to -- anything further?

22 MR. CASTLE: Your Honor, 12-14, I know that
23 was a part of their motion, but I'm asking the court to
24 consider this as well because it connects up to a couple
25 of things that are going on with Mr. Diehl relating to

1 the purchase the Mini Cooper and related to his
2 Statement of Financial Affairs and his testimony at the
3 341 meeting.

4 THE COURT: I'm looking for 14.

5 MR. CASTLE: I have a copy.

6 THE COURT: That's the driver's license and
7 it's got the business card.

8 MR. CASTLE: Yes.

9 THE COURT: Was that attached to the
10 resolution?

11 MR. CASTLE: Your Honor, this is a
12 transaction that occurred on May 15th of 2012.

13 THE COURT: Okay.

14 MR. CASTLE: So, no, it would not be
15 attached to that.

16 THE COURT: I now see the e-mail. This is
17 the permission to have the keys made.

18 MR. CASTLE: Yes, where he's representing --

19 THE COURT: The motion is denied as to that.

20 MR. CASTLE: Thank you.

21 THE COURT: All right. Anything on that
22 motion before we go to the other one? Any further
23 argument on the other motion before I announce my ruling
24 on it?

25 MR. HIRATA: No, Your Honor.

1 MR. WASHBURN: Any further argument that
2 would change the ruling that you're about to announce,
3 Your Honor?

4 THE COURT: It depends on what you say.

5 MR. WASHBURN: No, Your Honor.

6 THE COURT: Let me tell you how I approach
7 this ruling. First of all, with respect to the evidence
8 that we've just considered, I think it falls under the
9 classification of intrinsic evidence. I think one of
10 the elements of proof is that Mr. Diehl was a managing
11 executive, that's one of the requirements that the
12 government is required to prove, and the documents go to
13 the fact that he was a managing executive and was
14 extrinsic evidence -- excuse me, intrinsic evidence.

15 MR. CASTLE: Thank you, Your Honor.

16 THE COURT: With respect to the other
17 motion, I do not find that the evidence is intrinsic
18 that has been proffered by the United States. So I
19 believe that the proper analysis is under a 404(b)
20 analysis as to that evidence.

21 Let me explain the way I'm analyzing this
22 and give you a chance to respond to that before I
23 finalize my ruling. I believe that it is -- if this
24 evidence is to come into evidence, it must come in under
25 the exception for other acts that satisfy the element of

1 proving intent or motive. And the intent and motive
2 that I believe is at issue is to whether there was an
3 intent to defraud by Mr. Diehl at the time -- excuse me,
4 that he signed -- that he signed the declaration in
5 which he failed to disclose SVA. As to that issue, the
6 way I view this is if there was evidence prior to the
7 time that he submitted that declaration that he had used
8 the SVA account as his personal account to pay for
9 personal expenses, and then he continues to use the
10 account to pay for personal expenses after he filed the
11 declaration, then I think the post-filing conduct does
12 indicate that he had an intent, at least there's an
13 argument for the jury from which the jury -- could be
14 argued to the jury that he had an intent to continue to
15 use the SVA account post-filing the same way he did
16 before filing, and that was an intent to fail to
17 disclose that information to defraud the creditors and
18 preclude them from considering assets of SVA in
19 assessing any plan of reorganization. So my thought is
20 that the government would be required to prove as
21 foundation that there was pre-filing, pre-declaration
22 use of the SVA account for personal use, and that
23 subsequent to the filing Mr. Diehl continued to use the
24 SVA account for personal use, and that that would
25 then -- if that foundation is satisfied, both the

1 pre-filing and the post-filing would come into evidence.
2 However, I think at some point the use of the account
3 becomes so remote -- so distant from the time of the
4 filing that its use for arguing intent serves no
5 purpose. It would appear to me that that date would be
6 the date of the filing of Mr. Diehl's personal tax
7 return in October of 2012.

8 So the way I've been analyzing and thinking
9 about this the use of the personal account should be
10 considered separately prior to the filing, use of the
11 SVA account for -- I misstated that. I'll restate it so
12 it's clearer. The use of the SVA account for personal
13 use should be separated pre-filing and post-filing, and
14 the post-filing period would continue up until I think
15 it's middle of October of 2012 when he filed his
16 personal income tax return. Beyond that I believe that
17 it becomes so distant and so separated from the time of
18 the filing that it has -- that its prejudicial value
19 then would outweigh any probative value it would have to
20 support the intent element.

21 Questions? You can try to convince me I'm
22 wrong in this, and if I'm wrong, I'll correct.

23 MR. CASTLE: Your Honor, I understand I'm
24 not the one that argued that motion, but you raised
25 another issue, and that is, if you are cutting off the

1 evidence as of October related to Mr. Diehl's intent,
2 that it would be our position that any argument about
3 what happened after that point in favor of Mr. Diehl,
4 whether he had a plan confirmed or not, whether the case
5 is still open is equally irrelevant as a defense, and it
6 wouldn't be appropriate for them to make that argument.
7 If they make that argument, then I would think we would
8 be able to show that evidence.

9 THE COURT: And I won't rule on that, but I
10 will acknowledge that that is an issue you can raise.
11 And if the post-October information is offered, I'll
12 hear argument at that time whether or not there is some
13 additional analysis that should be considered in
14 determining whether it's relevant at that point.

15 So any further comments, objections,
16 clarifications from counsel?

17 MR. WASHBURN: I guess I'm just curious on
18 the tax return, Your Honor, where that comes from. I
19 mean if I were looking at it I would say that the
20 intent -- if you were going to do a cutoff date, on that
21 September 27th when the order is filed where they say,
22 hey, SVA is an entity that's closely held related to me,
23 and, you know, it's been fully disclosed, that date
24 makes sense to me. I'm just interested in what the
25 rationale was behind it.

1 THE COURT: I'll tell you what my rationale
2 is and you can talk me out of it if I'm wrong. My
3 rationale is that the personal tax return that's filed
4 in October has relevance, and that the false return that
5 is alleged here is the Wasatch Pacific return and
6 whether or not income should have been reported on the
7 Wasatch Pacific return. The personal return becomes
8 relevant as to whether or not that was a material
9 failure to disclose as a part of the Wasatch return. If
10 Mr. Diehl had reported the million dollars on the
11 personal return, the Wasatch tax return may have been
12 immaterial because it in fact was required to flow
13 through a Subchapter S return in any event. So if the
14 return was reported on the October return, it doesn't
15 matter that he failed to report it on the Wasatch
16 Pacific return. But if he didn't report it on either
17 return, then it's relevant to show that there was
18 personal income that was not reported. Does that make
19 any sense?

20 MR. WASHBURN: Not really, and the reason I
21 say that, Your Honor, is the return that's being filed
22 in October of 2011 is a return -- or rather in October
23 of 2012 is a return for 2011. I guess I'm just getting
24 wires crossed between the tax case and the bankruptcy
25 case because from our perspective what we're attempting

1 to do is understand what its relevance is on the
2 bankruptcy case. The tax case, Your Honor --

3 THE COURT: Isn't the October '12 personal
4 return for the tax year 2011?

5 MR. WASHBURN: That's correct.

6 THE COURT: So it's the same tax year as the
7 Wasatch Pacific tax return.

8 MR. WASHBURN: Yes, Your Honor. And I guess
9 I'm trying to understand how the personal expenses in
10 2012 -- you know, Your Honor, it probably isn't worth
11 the couple of weeks' difference. I was just trying to
12 understand what the rationale was. And I understand it
13 now, and I'm not sure that there's enough at stake for
14 it to be worth disputing over a couple of weeks.

15 THE COURT: I recognize and I apologize, but
16 I think the government's going to have to redo some of
17 its exhibits to break it down into these categories, but
18 hopefully that won't be much more than a reorganization
19 problem.

20 MR. HIRATA: Just one question of
21 clarification, Your Honor. So based on the court's
22 ruling today, is the presumption, if you will, that the
23 end point is in October of 2012, that should either side
24 choose to go beyond that you will --

25 THE COURT: New issue, it's a new issue at

1 that point.

2 MR. HIRATA: Okay. Fair enough.

3 THE COURT: I'm not precluding that, that's
4 the guideline. And obviously as the case develops,
5 there may be issues that would make it relevant.

6 MR. HIRATA: Okay.

7 THE COURT: Anything further before we
8 recess?

9 MR. HIRATA: No, Your Honor.

10 MR. WASHBURN: No, Your Honor.

11 THE COURT: We will be in recess.

12 (Whereupon, the matter was concluded.)

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C E R T I F I C A T E

State of Utah

County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken before me at the time and place set forth herein and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of November, 2017.

 Karen Murakami

Karen Murakami, CSR, RPR